2023

Harming the Public Good: How the Supreme Court Erred in Cedar Point Nursery v. Hassid

Madison Alvis

Harming the Public Good: How the Supreme Court Erred in *Cedar Point Nursery v. Hassid*

Madison Alvis*

I. INTRODUCTION

Property rights are some of the most protected and sacred rights private citizens possess, but even so, courts have acknowledged they still are and must be subject to regulation at times in order to promote the general welfare. For example, lessors are subject to regulations to ensure that the properties they lease are habitable.[1] There are also regulations concerning what owners can do with their property so it is not used in a way that harms others, such as owners being restricted from making their property a public nuisance.[2] Regulations such as these have been upheld as valid, and thus not as "takings"—i.e. taking a property away from the owner—which is invalid without just compensation under the Fifth Amendment.[3] In *Cedar Point Nursery v. Hassid*, the California regulation at issue did not completely take a property right away from the farm owners, yet it was still held to be a taking.[4] The regulation only required farm owners to give property access to organizers, at times their workers were not working, in order to discuss union matters.[5] These farm owners had one of the many property rights they possessed regulated, but not taken.

Cedar Point stemmed from a California regulation that gave union representatives access to an agricultural employer's property for three hours a day—one hour before work, one at the employee's lunch break, and one after work—for 120 days out of the year, in order to talk to workers about union matters.[6] Under California law, workers "have the right to self-organization,

* J.D. Candidate, 2023, Seton Hall University School of Law; B.A., University of Massachusetts Amherst. I would like to thank Professor Angela Carmella for her thoughtful comments and helpful guidance throughout the Comment-writing process.

[1] *See* Paula Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 Rutgers L. Rev. 1,1 (2016).

[2] *See* Maureen E. Brady, *Turning Neighbors Into Nuisances*, 134 Harv. L. Rev. 1609, 1613 (2021).

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

[4] 141 S. Ct. 2063, 2070 (2021).

[5] 8 CCR § 20900 (2021).

[6] *Id*.

to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]"[7]

Two farms, Cedar Point Nursery and Fowler Packing Company, separately filed complaints against union representatives in order to block these representatives from accessing their properties, and subsequently these cases were consolidated.[8] Cedar Point Nursery is a strawberry grower that employs over 400 seasonal workers and around 100 full-time workers.[9] Cedar Point filed a complaint against the union because union organizers entered Cedar Point's property without notice and started a protest.[10] Fowler Packing Company is a grower and shipper of table grapes and citrus that has 1,800 to 2,500 employees in its field operations and about 500 in its packing facility.[11] Union organizers tried to access Fowler's property, but were blocked from entering.[12] To ensure the organizers did not attempt to access the property again, the owners filed suit.[13] *Cedar Point* presented a regulatory takings issue, leaving the U.S. Supreme Court to determine whether the regulation was valid or an impermissible taking requiring just compensation under the Fifth Amendment.[14] The Court held that a *per se* taking had occurred and that the regulation was an impermissible taking.[15]

[7] Cal. Lab. Code § 1152 (2021).
[8] *Cedar Point Nursery*, 141 S. Ct. at 2070.
[9] *Id.* at 2069.
[10] *Id.* at 2070.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2070 (2021).
[15] *Id.* at 2072.

This Comment will argue that the Supreme Court should have evaluated *Cedar Point* under the *Penn Central*[16] balancing test, as prior case law with similar facts had,[17] and held that the regulation was not a taking. Additionally, this Comment will argue that the Court misconstrued precedent by evaluating the case under the *per se* test, likely due to its anti-union bias. Specifically, Part II will give an overview on the Takings Clause in the Fifth Amendment and discuss eminent domain and regulatory takings. Part II will then introduce the two tests utilized for evaluating whether a regulation constitutes a compensable taking: the *Penn Central* balancing test and the *per se* test. Part III will give a brief overview of the rise of unions in the United States, their importance, and their necessity in protecting workers' rights. Part IV will examine the *Cedar Point* opinion and the cases the majority uses to support its argument that the regulation is a *per se* taking. Part V will explain why the Court should have employed the *Penn Central* balancing test through an analysis of precedent and a consideration of the dissent's argument. Part V will then show that if the Court had applied the *Penn Central* balancing test to the facts of *Cedar Point*, the regulation would have been found not to be a taking. Finally, Part VI will discuss the policy implications of the *Cedar Point* decision and give an overview of the anti-union case-law leading up to this decision.

II. THE FIFTH AMENDMENT AND AN OVERVIEW OF THE TYPES OF TAKINGS

The Takings Clause is found in the Fifth Amendment of the Constitution, and is applicable to the states through the Fourteenth Amendment.[18] It states: "nor shall private property be taken

[16] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) (under the balancing test, courts should consider: the economic impact of the regulation on the owner, the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the character of the government action involved in the regulation).
[17] *See id.*; *see also* Arkansas Game & Fish Comm'n v. United States 568 U.S. 23, 26 (2012); PruneYard Shopping Ctr. V. Robins, 447 U.S. 74, 77 (1980).
[18] U.S. CONST. amend. V.

for public use, without just compensation."[19] When the government "physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation."[20] Section A will discuss what government conduct constitutes a *per se* taking. Section B will discuss regulatory takings and the balancing test created by the *Penn Central* Court.

A. Per se Takings

There are two categories of government conduct that constitute *per se* takings.[21] The first category is when the government uses its power of eminent domain to formally condemn property and take it for public use.[22] When the government uses this power of eminent domain, it must provide just compensation.[23] Eminent domain case law has centered around the issue of what constitutes a public use.

The second category is "when the government causes a permanent physical occupation of private property."[24] Physical appropriations of property are assessed using "a simple, *per se* rule: The government must pay for what it takes."[25] For example, when the government acts in a way that results in a servitude or public easement on private property, it is evaluated under the *per se* rule.[26]

An example of when the Court has evaluated a case under the *per se* rule is *Horne v. Department of Agriculture*.[27] At issue there was whether the Takings Clause barred the Government from ordering a percentage of crops to be set aside for the Government, free of

[19] *Id*.
[20] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021).
[21] *Id*. at 2082.
[22] *Id*. at 2071.
[23] *Id*. at 2071.
[24] *Id* at 2082 (citing Lingle v. Chevron U.S.A. Inc. 544 U.S. 528, 538 (2005)).
[25] *Id*. at 2071.
[26] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (2021).
[27] Horne v. Dep't of Agric., 576 U.S. 351, 354 (2015).

charge.[28] The Government would then sell, allocate, or otherwise dispose of the raisins in order to maintain an orderly market.[29] The Court held that the government's physical appropriation of raisins (personal property) was a *per se* taking.[30] The majority posited that "[t]he Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."[31] The reserve requirement caused the growers to "lose the entire 'bundle' of property rights in the appropriated raisins-'the rights to possess, use and dispose of them,'" thus a *per se* taking.[32] The Court found that "[p]eople still do not expect their property, real or personal, to be actually occupied or taken away."[33]

Importantly, the Court noted that economic impacts stemming from a physical taking are inherently different than economic impacts stemming from a regulatory limit—even if these impacts look the same to the grower.[34] The justices stated that such a "distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation. A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends."[35]

B. Regulatory Takings and the Balancing Test

A regulatory taking occurs when a regulation crosses the line to become a taking because the regulation so greatly affects someone's private property rights.[36] To ascertain this, a balancing test is used to determine when the regulation has gone too far.[37]

---

[28] *Id.*
[29] *Id.*
[30] *Id.* at 358.
[31] *Id.*
[32] *Id.* at 361.
[33] Horne v. Dep't of Agric., 576 U.S. 351, 361 (2015).
[34] *Id.* at 362.
[35] *Id.*
[36] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021).
[37] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

One of the original cases in which the Court established that a regulation can cross that line into being a taking is *Pennsylvania Coal Co. v. Mahon*.[38] This case centered around a Pennsylvania Act that forbade the mining of coal if it would affect the subsidence of a dwelling.[39] Before the Act was passed, a coal company had conveyed a deed to the surface of a plot of land to the Mahons, but reserved the right to mine underneath and stated that the buyers purchased the land knowing the risk that the surface could give way.[40] The Court held that while property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking.[41] The Act was declared unconstitutional so far as it affected the mining of coal under places where that right had been reserved.[42] The Court posited that "to make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[43] Importantly, the regulation at issue in *Pennsylvania Coal Co.* went too far because it *completely* took away the coal company's right to use its property in a valuable way.[44]

To give more guidance than *Pennsylvania Coal Co.*'s "goes too far" standard, the balancing test, which this Comment argues should have been applied in *Cedar Point*, was established in *Penn Central Transportation Co. v. New York City*.[45] The issue before the Court in this case was whether New York City could, "as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks. . .without effecting a 'taking.'"[46] The law prevented Penn Central, owner of Grand Central Terminal, from

[38] *See generally* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
[39] *Id.* at 412.
[40] *Id.*
[41] *Id.* at 415.
[42] *Id.* at 414.
[43] *Id.*
[44] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).
[45] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978), *Pennsylvania Coal Co.*, 260 U.S. at 415.
[46] *Penn Central Transportation Co.*, 438 U.S. at 107.

exploiting the air space above the terminal by denying it permission to build an office tower.[47] The Court held there was no regulatory taking.[48] The Court pointed out that "[l]egislation designed to promote the general welfare commonly burdens some more than others."[49]

The Court held that in determining whether a state regulation constitutes a taking under the Fifth and Fourteenth Amendments, courts should consider: the economic impact of the regulation on the owner, the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the character of the government action involved in the regulation.[50] Regarding the character of the government action involved, the Court stated: "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[51]

To support its holding that the regulation was not a taking requiring just compensation, the Court posited that the law "neither exploit[ed] appellants' parcel for city purposes nor facilitate[d] nor ar[ose] from any entrepreneurial operations of the city."[52] The appellants, Penn Central, could still use the parcel in a "gainful fashion."[53] The Court looked at the severity of the impact of the law on the property, and found none because the "appellants may continue to use the property precisely as it has been used for the past 65 years[.]"[54] There was, therefore, no interference with Penn Central's primary expectation of how they could use the property.[55]

---

[47] *Id.* at 117.
[48] *Id.* at 138.
[49] *Id.* at 133.
[50] *Id.* at 124.
[51] *Id.*
[52] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 135 (1978).
[53] *Id.*
[54] *Id.* at 136.
[55] *Id.*

Additionally, Penn Central was not "prohibited from occupying *any* portion of the airspace above the Terminal."[56] Rights to develop the airspace could be transferred to other nearby parcels; further, another development plan may have been approved.[57] While Penn Central had some of its property rights regulated for the common good of preserving landmarks, it still could make a profit and get beneficial use from the property.[58] In the Court's view, "[t]he restrictions imposed [we]re substantially related to the promotion of the general welfare and . . . .permit[ed] reasonable beneficial use of the landmark site."[59]

III. A BRIEF OVERVIEW OF UNIONS IN THE UNITED STATES

In the early nineteenth century, before there were federal labor and union laws in place, attempts by workers to strike to get better wages or improved workings conditions were "commonly condemned as criminal conspiracies."[60] In 1935, Congress passed the National Labor Relations Act ("NLRA"), the "first comprehensive federal regulation of the relations between American employers and unions."[61] Importantly, the NLRA does not apply to specific types of employment, such as farm workers.[62]

The Migrant and Seasonal Agricultural Worker Protection Act of 1983 is a federal employment law specifically for farm workers.[63] The law contains some protections, including that "employers must disclose terms of employment at the time of recruitment…[and that any] provided housing must meet local and federal housing standards and transport vehicles must meet

---

[56] *Id.* at 136.
[57] *Id.*
[58] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 136 (1978).
[59] *Id.* at 138.
[60] Theodore J. St. Antoine, *The Regulation of Labor Unions*, 30 AM. J. COMP. L. SUPP. 299, 299 (1982).
[61] *Id.* at 300.
[62] *Id.* at 310.
[63] National Farm Worker Ministry, *U.S. Labor Law for Farm Workers*, NFWM (2018), http://nfwm.org/fam-workers/farm-worker-issues/labor-laws/.

basic federal safety standards[.]"[64] But, basic labor protections such as "workers' compensation, health insurance and disability insurance" are lacking for farmers, and these farmers similarly "lack protection for joining unions and engaging in collective bargaining."[65] Because of this lack of federal protection for basic workers' rights, farmers are completely reliant on state legislation to provide them with those protections.[66]

Historically, unions have helped workers in "creating healthy and safe workplaces[,]…gain[ing] control over their scheduling and job security, and . . . increas[ing] democratic participation.[67] Labor unions give workers power to make demands of their employers to ensure fair wages and safe working conditions.[68] Studies have shown that "[i]ncome is higher in union jobs than in nonunion jobs, especially for lower-skilled workers."[69] Additionally,"[u]nion employees are more likely to have a retirement or pension plan and are more likely to participate in a retirement plan sponsored by their employer."[70] These important benefits for those in a union make it vital for workers to have access to their union representatives and learn about their rights and make sure that they are not being taken advantage of. Unions give power to workers who could otherwise be exploited, which is a significant contribution to the public good.

IV. THE *CEDAR POINT* DECISION

As previously mentioned in Part I, *Cedar Point Nursery v. Hassid* stemmed from a California regulation that gave union representatives access to an agricultural employer's property for three hours a day for 120 days out of the year within four 30 day periods—one hour before

---

[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] Jenn Hagedorn et al., *The Role of Labor Unions in Creating Working Conditions That Promote Public Health*, AM. J PUB. HEALTH VOL. 106 989, 989 (2016).
[68] *Id*.
[69] *Id*.
[70] *Id*.

work, one at the employee's lunch break, and one after work—in order to talk to workers about union matters.[71] In order to obtain access to the property, a written notice had to be filed and the employer had to be served with a copy.[72] Organizers could not engage in disruptive conduct, but could otherwise meet and talk with employees.[73]

The growers filed suit in Federal District Court, arguing that the access was an unconstitutional *per se* physical taking.[74] They sought declaratory and injunctive relief barring the Board from enforcing the regulation.[75] The District Court denied the motion and granted the Board's motion to dismiss.[76] The Court posited the regulation was subject to evaluation under the *Penn Central* balancing test, which the growers had not attempted to satisfy.[77] The Court of Appeals for the Ninth Circuit affirmed, agreeing with the District Court that the regulation was not a *per se* taking.[78] The Ninth Circuit denied rehearing en banc and the Supreme Court granted certiorari.[79]

In *Cedar Point,* the majority held that "whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place."[80] Additionally, the Court found that the California regulation "appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking."[81] The regulation, in the majority's opinion, did not regulate the way the growers used their property, but instead took away

[71] 8 CCR § 20900.
[72] *Id*.
[73] 8 CCR §20900(e)(3)(A), (4)(C).
[74] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2070 (2021).
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).
[81] *Id*.

an owner's right to exclude others—for the benefit of third parties.[82] The majority cited precedent that is factually incompatible with *Cedar Point* to support its assertion that *any* government authorized invasion of property is a physical taking that requires just compensation.[83]

In one of these cases, *United States v. Causby*, the Court held that an invasion of private property by overflights effected a taking.[84] There, the government was frequently flying military aircraft at low altitudes over the Causby farm, grazing the treetops, and terrorizing their poultry.[85] The Court observed that ownership of the land extended to low airspace, and that invasions of this airspace encompass the same category as surface invasions.[86] The Court held that an easement had been imposed upon the land because the damages suffered (diminution in value) were a product of a direct invasion of their farm.[87] The Court discussed how "[a]s a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright."[88] But, this case is distinguishable from *Cedar Point* because in *Cedar Point*, the farmers did not suffer a diminution in value or have to give up their businesses due to union representatives being allowed on their farm during non-working hours.[89]

The Court also cited *Kaiser Aetna v. United States*, in which a real-estate developer dredged a pond, converted it into a marina, and connected it to a nearby bay and the ocean.[90] The government asserted that the developer could not exclude the public from the marina because the

[82] *Id.*
[83] *Id.* at 2074.
[84] United States v. Causby, 328 U.S. 256, 261 (1946).
[85] *Id.* at 258.
[86] *Id.* at 261.
[87] *Id.* at 267.
[88] *Id.* at 259.
[89] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2070 (2021).
[90] Kaiser Aetna v. United States, 444 U.S. 164, 165 (1979).

pond had become navigable water.[91] The Court held that the right to exclude falls within the category of interests the government cannot take without just compensation.[92] The imposition of a navigational servitude would result in an actual physical invasion of the privately owned marina by members of the public.[93] This servitude, or easement, allowed the public to enter and use the developer's land, and a physical invasion of such magnitude required payment of just compensation..[94] The Court posited that "[t]his is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property."[95] Despite the majority's reliance on this case, *Cedar Point* is distinguishable because the California regulation did not completely take away the farmers' right to exclude; they still could exclude the public from their farm.[96] The farmers could even exclude the union representatives outside of the designated times.[97]

The Court also relied on *Loretto v. Teleprompter Manhattan CATV Corp.*, in which it held that a permanent physical occupation constitutes a *per se* taking regardless of whether it results in only a trivial economic loss.[98] New York adopted a law that required landlords to let cable companies install equipment on their properties.[99] Where government action results in a *permanent* physical occupation of property, cases uniformly have found taking to extent of the occupation, without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner.[100] The Court posited that "this Court's most recent

[91] *Id.* at 166.
[92] *Id.* at 180.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2070 (2021).
[97] *Id.*
[98] Loretto v. Teleprompter Manhattan CCTV Corp., 458 U.S. 419, 426 (1982).
[99] *Id.* at 421.
[100] *Id.* at 426.

cases . . . have emphasized that physical *invasion* cases are special and have not repudiated that rule that any permanent physical *occupation* is a taking."[101] This case is also distinguishable from *Cedar Point*, because in this case there was a permanent physical occupation of property which caused it to be a *per se* taking.[102] In *Cedar Point*, the regulation does not impose a *permanent* physical occupation of the farms, but rather a requirement that only allows limited access to union organizers at specific times during the year.[103] For *Loretto* to apply, the law would have to require farm employers to give over physical space for a union office, staffed year-round, on their property.[104] Thus, this narrow law should not be considered a *per se* taking.[105]

A final case relied on by the majority is *Nollan v. California Coastal Commission*.[106] In *Nollan*, the Nollans sought a permit to build a larger home on their beachfront lot.[107] The Commission issued this permit subject to the condition that the Nollans grant the public an easement to pass through their property along the beach.[108] The Court reiterated that an appropriation of an easement constitutes a physical taking.[109] The Court posited that a "'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed[.]"[110] The Court further stated that "[u]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use[.]"[111] If there had been a direct nexus between the impact caused by the development and

[101] *Id.* at 432.
[102] *Id.* at 426.
[103] *See* Cedar Point Nursery v. Hassid, 141 S. Ct 2063, 2070 (2021).
[104] *See* Loretto v. Teleprompter Manhattan CCTV Corp., 458 U.S. 419, 432 (1982).
[105] *See Cedar Point Nursery*, 141 S. Ct at 2070.
[106] Nollan v. California Coastal Commission 483 U.S. 825, 827 (1987).
[107] *Id.*
[108] *Id.*
[109] *Id.* at 832.
[110] *Id.*
[111] *Id.* at 837.

the condition requiring access, it would have been constitutional.[112] Without a direct nexus, there was a *per se* taking.[113] This case is also distinguishable from *Cedar Point* because again, the majority is using a case where there was a *permanent* physical occupation of land—a public easement across the owner's beach—to justify their *per se* analysis of the California regulation. The fact that there was no permanent occupation in *Cedar Point* is of great significance and calls for the Court to analyze the facts of the case under the balancing test.

In his concurrence in *Cedar Point*, Justice Kavanaugh agrees with the majority but points to a case it chooses not to discuss.[114] He cites to *NLRB v. Babcock & Wilcox Co.*, a case where employers refused to allow union literature to be distributed by union organizers on company-owned parking lots.[115] The NLRB argued that the National Labor Relations Act afforded union organizers the right to enter company property in order to communicate with employees.[116] The Court agreed with the employers' argument that the employers had not violated the Act by "unreasonably imped[ing] their employees' right to self-organization."[117] The Court reasoned that the national government, via the Constitution, preserves property rights, including the right to exclude from property.[118] The Court interpreted the Act to afford access to union organizers only when needed—such as when employees live on company property and union organizers have no other reasonable means of communicating with employees.[119] The *Babcock* Court thus created a necessity exception, stating that "[w]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the

[112] Nollan v. California Coastal Commission 483 U.S. 825, 837 (1987).
[113] *Id.*
[114] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021) (Kavanaugh, J., concurring).
[115] NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 106 (1956).
[116] *Id.*
[117] *Id.*
[118] *Id.* at 112.
[119] *Id.*

right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."[120]

Justice Kavanaugh's reading tells him employers have a basic Fifth Amendment right to exclude from their private property, subject to the necessity exception.[121] Justice Kavanagh does not believe the facts of *Cedar Point* fit within the necessity exception because the employees do not live on the growers' properties and the union organizers have other reasonable means to communicate with employees.[122] But notably, this case centered on the National Labor Relations Act and did not delve into the relationship between the right to exclude and takings law.[123] The issue in *Babcock* was not whether a law permitting union workers access was a taking, so it does not directly bear on *Cedar Point.*[124] In the majority opinion, the justices distinguish *Babcock* because it did not involve a takings claim, and rejects Justice Kavanaugh's assertion.[125] The concurrence feels the need to point out this case and praise the majority for so closely adhering to precedent, but then cites precedent that is not a close match to *Cedar Point.*[126]

V. WHY THE COURT SHOULD HAVE ANALYZED *CEDAR POINT* UNDER THE *PENN CENTRAL* BALANCING TEST AND FOUND THE REGULATION WAS NOT A TAKING

The Court should have applied the *Penn Central* balancing test to *Cedar Point* because the temporary invasion is minimal and not a *per se* taking.[127] If the balancing test had been applied, the regulation would have been found to not be a taking. As previously mentioned in Part II, in determining whether a state regulation constitutes a taking under the Fifth and Fourteenth

[120] *Id.*
[121] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021) (Kavanaugh, J., concurring).
[122] *Id.*
[123] *See Babcock*, 351 U.S. at 106.
[124] *Id.*
[125] *Cedar Point Nursery*, 141 S. Ct at 2077 (Kavanaugh, J., concurring).
[126] *Id.* at 2080.
[127] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

Amendments, courts consider: the economic impact of the regulation on the owner, the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the character of the government action involved in the regulation.[128] Applying this test to *Cedar Point*, there was no economic impact on the farm owners because their properties can be used in the same way they were used before the regulation. Additionally, farmers can still expect profits from their farm regardless of if union representatives are allowed on their property. Finally, this interference with property arises from a public program meant to promote the common good.[129]

A. The Union Organizer's Temporary Invasion Warrants Analysis Under the Balancing Test.

The regulation at issue in *Cedar Point* does not appropriate a right from the farm owners; it only regulates their right to exclude others.[130] It regulates the employers' property rights, and just compensation only needs to be paid if the regulation goes too far by failing the balancing test.[131] The regulation does not take an easement over the grower's property.[132] As the dissent argues, the regulation "does not, for example, take from the employers, or provide to the organizers, any freehold estate…any concurrent estate…or any leasehold estate . . . Nor (as all now agree) does it provide the organizers with a formal easement or access resembling an easement."[133] It is unclear, therefore, why the majority evaluated this case as a *per se* taking of an easement when it lacks any of the characteristics previously used to distinguish a *per se* taking from a regulatory taking. The majority argues that even if the regulation is not an easement in its exact definition, it does not matter because "[u]nder the Constitution, property rights 'cannot be

[128] *Id*.
[129] *Id*.
[130] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2081 (2021) (Breyer, J., dissenting).
[131] *See Pennsylvania Coal Co*., 260 U.S. at 415.
[132] *Cedar Point Nursery*, 141 S. Ct at 2082 (Breyer, J., dissenting).
[133] *Id*.

so easily manipulated." But, the justices are manipulating property rights by forcing the facts of *Cedar Point* into the definition of an easement when they do not fit. It is like a children's puzzle where the round peg will not fit in the square hole.

This regulation allows only a temporary invasion of a landowner's property, and this kind of temporary invasion amounts to a taking only if it goes too far.[134] This case is distinguishable from *Kaiser Aetna, Loretto,* and *Nolan* because in this case there is no permanent physical invasion that the government is forcing on farm owners.[135] This is a temporary invasion, limited to a specific number of days a year, for a public benefit.[136] This case should fall within *Penn Central* and be evaluated under the balancing test.[137] There is a difference between a permanent invasion, which takes away the rights to "possess, use, and dispose of" property and regulating one of the sticks in the property rights bundle.[138] *Causby* and *Kaiser Aetna*, two of the cases relied on by the majority, all concerned "whether the Court considered the occupation at issue to be *temporary* (requiring *Penn Central*'s 'too far' analysis) or *permanent* (automatically requiring compensation)."[139] The majority used these precedents as justification for their analysis of *Cedar Point* as a *per se* taking, but ignored the fact that these cases told them to evaluate a temporary occupation under the *Penn Central* balancing test.[140]

As previously discussed in Part IV, *Loretto v. Teleprompter Manhattan CATV Corp.* is relied on by the majority, but the dissent distinguishes this case from the way the majority uses it.[141] In *Loretto,* the installation of the cable wires amounted to a *permanent* physical occupation

---

[134] *Id.* at 2081.
[135] *See* Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979); Loretto v. Teleprompter Manhattan CCTV Corp., 458 U.S. 419, 435 (1982); Nollan v. California Coastal Commission 483 U.S. 825, 832 (1987).
[136] *See Cedar Point Nursery*, 141 S. Ct at 2069.
[137] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).
[138] *Loretto*, 458 U.S. at 435.
[139] *Cedar Point Nursery*, 141 S. Ct at 2086 (Breyer, J., dissenting).
[140] *Id.*
[141] *Id.* at 2084.

of the property and that is why it was a *per se* taking.[142] The "permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude."[143]

Courts evaluate temporary invasions of property under the *Penn Central* balancing test, like in *Arkansas Game and Fish Comm'n v. United States*.[144] The dispute in this case arose because the U.S. Army Corps authorized flooding that affected forest land owned by the Arkansas Game and Fish Commission.[145] The authorized flooding "damaged or destroyed more than 18 million board feet of timber and disrupted the ordinary use and enjoyment of the Commission's property."[146] The issue before the Court was whether a taking had occurred because of the temporary, but repetitive, flood invasions.[147] The Court held that permanent physical occupations are *per se* takings, but temporary invasions are not.[148] Temporary invasions are subject to a more complex balancing process to determine whether they are a taking.[149] Courts should consider the length of the invasion, the "degree to which the invasion is intended or is the foreseeable result of authorized government action," "the character of the land at issue," "the owner's 'reasonable investment-backed expectations' regarding the land's use," and the "[s]everity of the interference."[150]

In *Cedar Point*, there is no permanent physical occupation of the property; the union organizers are not laying wires on the farms that would amount to a permanent physical occupation as there was in *Loretto*.[151] The union representatives are temporarily on the farm for a few hours

---

[142] Loretto v. Teleprompter Manhattan CCTV Corp., 458 U.S. 419, 426 (1982).
[143] *Id.* at 435.
[144] Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 26 (2012).
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at 37.
[149] *Id.*
[150] Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 37 (2012) (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)..
[151] Loretto v. Teleprompter Manhattan CCTV Corp., 458 U.S. 419, 435 (1982).

a day for a limited number of days out of the year.[152] The dissent gives an example of a similar federal statute at issue in *Central Hardware Co. v. NLRB* that did *not* effect a *per se* taking that is almost identical to the regulation before the Court.[153] That statute provided "'access . . . limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of the organization activity.'"[154]

As previously mentioned in Part IV, the majority relies on *United States v, Causby*, where the invasion of airspace destroyed the profitable use of the farm that was beneath it because the government action indirectly killed the farm's chickens.[155] This case is distinguishable from *Causby*, however, because the growers can still use their farms to grow whatever they please, and they can still beneficially use their farms for profit. Allowing union organizers on to their farm does not prevent Cedar Point from being able to grow strawberries.[156] The majority also relies on *Nollan v. California Coastal Commission*, where the Court held that there was a *per se* taking because individuals would have a *permanent* and continuous right to pass that was unrelated to the aim of the regulation.[157] But, *Nollan* is also distinguishable from *Cedar Point* because there is no permanent and continuous right at issue. Additionally, allowing union representatives on to farm property for a few hours a day at non-working times directly serves the purpose of the regulation at issue.[158] The regulation has a direct relation to the regulation's purpose of supporting "the right of farm workers to organize and to bargain collectively" by making sure workers have access to their representatives.[159]

---

[152] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).
[153] *Id.* at 2083 (Breyer, J., dissenting).
[154] *Id.* at 2084 (quoting Central Hardware Co. v. NLRB, 407 U.S. 539, 545 (1972)).
[155] United States v. Causby, 328 U.S. 256, 259 (1946).
[156] *See Cedar Point Nursery*, 141 S. Ct. at 2069.
[157] Nollan v. California Coastal Commission 483 U.S. 825, 832 (1987).
[158] *See Cedar Point Nursery*, 141 S. Ct. at 2069.
[159] Cal Lab Code § 1152.

A case that is actually similar to *Cedar Point* is *PruneYard Shopping Center v. Robins*, so arguably, the majority should have utilized the same evaluation as the one done in *PruneYard*. The case arose because of a state constitutional requirement that a privately owned shopping center must permit other individuals to enter upon, and to use, the property to exercise rights to free speech and petition through engaging in leafleting.[160] The Court held that under the balancing test, this requirement was not a *per se* taking in part because "there was nothing to suggest that preventing the owner from prohibiting this sort of activity would unreasonably impair the value or use of the property as a shopping center."[161] Additionally, the owner could "adopt time, place, and manner regulations that would minimize any interference with its commercial functions."[162] In *Cedar Point*, there were time, place, and manner regulations in place that minimized interference with commercial functions, yet the Court still found it to be a *per se* taking.[163] Additionally, the Court in *PruneYard* discussed how the case was distinguishable from *Kaiser Aetna* because the shopping center owners "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"[164] This is notable because the majority in *Cedar Point* used *Kaiser Aetna* as justification for using a *per se* evaluation when precedent clearly distinguishes them from one another.[165]

The *Cedar Point* majority argues that "unlike the growers' properties, the PruneYard was open to the public…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

[160] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77 (1980).
[161] *Id.* at 83.
[162] *Id.*
[163] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).
[164] *PruneYard Shopping Ctr.*, 447 U.S. at 84.
[165] *Cedar Point Nursery*, 141 S. Ct. at 2077.

property closed to the public."[166] The PruneYard is a privately owned shopping center, so regardless of the fact that customers are allowed to be on the premises at certain hours, it is still privately owned.[167] It is illogical to distinguish two privately owned businesses from one another based on the fact that one business has patrons on the premises and one does not. Property does not "lose its private character merely because the public is generally invited to use it for designated purposes."[168] This is further evidence of the majority ignoring case law that tells it to evaluate *Cedar Point* under a balancing test instead of a *per se* analysis. The Court's decision completely breaks away from settled case law and shoves temporary invasions of property into the *per se* category, which they do not belong in.

B. If The Balancing Test Had Been Applied, the Regulation Would Have Been Upheld

If the Court had properly applied the *Penn Central* balancing test, the regulation would have passed with flying colors and would not be a taking.[169] As previously discussed in Part II, in determining whether a state regulation constitutes a taking under the Fifth and Fourteenth Amendments, courts consider: the economic impact of the regulation on the owner, the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the character of the government action involved in the regulation.[170] In *Penn Central*, the Court held that the landmark law at issue was not a taking because it satisfied the balancing test.[171] The Court posited that the restrictions the law imposed were "substantially related to the promotion of the general welfare" and still permitted reasonable beneficial use of the land, while also giving Penn Central opportunities to enhance other properties.[172]

---

[166] *Id.*
[167] *See PruneYard Shopping Ctr.*, 447 U.S. at 81.
[168] Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).
[169] *See* Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).
[170] *Id.*
[171] *Id.* at 138
[172] *Id.*

Applying the same balancing test to *Cedar Point*, the regulation does not have an economic impact on the farmers and has not interfered with their investment-backed expectations.[173] The presence of union workers on the property does not cause a farm to be worth less in value. The farmers can still use their farms to grow food and sell their products. Additionally, the interference from having union workers come on to their farms "arises from [a] public program adjusting the benefits and burdens of economic life to promote the common good."[174] The goal of the *Cedar Point* regulation was to give farm workers access to their union representatives, thereby furthering the common good, as will be discussed further in Part VI.[175] The *Cedar Point* regulation, therefore, should have satisfied the balancing test and been found not to be a taking.

VI. POLICY CONSIDERATIONS IMPLICATED IN *CEDAR POINT*

A. The Importance of Farm Workers Having Access to Union Representatives

Farm workers in particular need access to their union representatives to help make sure they are not being taken advantage of. Reports have shown that "[t]he vast majority (over 70%) of federal labor standards investigations of farms conducted by the Wage and Hour Division (WHD) of the U.S. Department of Labor detect[ed] violations."[176] These violations included things such as wage theft and inadequate housing.[177] California has one of the highest rates of farm employment, making it vital to provide support for unions to try to prevent violations like the ones reported from happening so frequently.[178] Additionally, "farmworkers either lack an immigration status or have a temporary status, which makes it difficult in practice for them to

[173] *Id.* at 124.
[174] *Id.*
[175] *See* 8 CCR § 20900 (2021).
[176] DANIEL COSTA ET AL., ECONOMIC POL'Y INSTIT., FEDERAL LABOR STANDARDS ENFORCEMENT IN AGRICULTURE, 1 (2020).
[177] *Id.*
[178] *Id.*

complain about workplace violations."[179] The majority's decision in *Cedar Point* hurts the common good by making it more difficult for farm workers, a group that clearly needs state protection, to have access to their union representatives.

Additionally, there is caselaw, such as *State v. Shack*, that highlight how a decision such as *Cedar Point* harms the public good. In *Shack*, the New Jersey Supreme Court recognized the importance of workers having access to union representatives.[180] The defendants in *Shack* entered upon private property to aid migrant farmworkers employed and housed there and were charged with trespass.[181] The Court held that "[t]itle to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law."[182] Further, the Court noted that farmers are "a highly disadvantaged segment of our society . . . The migrant farmworkers . . . are rootless and isolated. Although the need for their labors is evident, they are unorganized and without economic or political power."[183] The Court concluded that "[t]he quest is for a fair adjustment of the competing needs of the parties[.]"[184] The regulation in *Cedar Point* was that fair adjustment because it gave workers access to union representatives, helping a disadvantaged group, while limiting the hours union representatives could access farm property.[185]

Another decision that highlights how a decision such as *Cedar Point* harms the public good is *Central Hardware Co. v. NLRB*.[186] Central, owner and operator of two retail hardware stores, had a no-solicitation rule and kept Union organizers off the company premises, including the

[179] *Id.*
[180] State v. Shack, 58 N.J. 297, 303 (N.J. 1971).
[181] *Id.* at 299.
[182] *Id.* at 303.
[183] *Id.*
[184] *Id.* at 307.
[185] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).
[186] *See* Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972).

parking lots.[187] The Court discussed how "organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others."[188] The Court even noted that there has been a tradition of union organizers engaging "in conduct inconsistent with traditional notions of private property rights," in order to provide workers with essential information.[189] The regulation in *Cedar Point* made sure employees would have the ability to receive this "essential information," and now this decision hinders their ability to do so.[190]

Workers having rights must coincide with knowing and understanding those rights. The regulation allowing union representatives on farm property to discuss union matters with employees "addresses a critical problem in federal labor law, which, on paper, grants employees certain rights but gives labor union representatives little opportunity to communicate those rights to employees."[191] The Supreme Court has harmed the public good by holding the solution to this critical problem as unconstitutional.

B. The Anti-Union Trend in the Supreme Court's Recent Caselaw

The anti-union trend in the Supreme Court's recent caselaw illustrates the potential anti-union bias with the newly constituted Court and helps to explain why the justices may have chosen to evaluate *Cedar Point* under the inapt *per se* test. The Court was previously sympathetic and open to the need to unionize.[192] In *Babcock*, for example, the Court discussed how "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of

[187] *Id.* at 540.
[188] *Id.* at 543.
[189] *Id.*
[190] *See Cedar Point Nursery*, 141 S. Ct. at 2069.
[191] Nathan S. Newman, *The Legal Foundations for State Laws Granting Labor Unions Access to Employer Property*, 62 DRAKE L. REV. 689, 691(2014).
[192] *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).

self-organization from others."[193] But that changed in *Janus v. AFSCME, Council 31*, where the Supreme Court aggressively used the First Amendment to justify their decision that went against union objectives.[194] This case arose because of an Illinois law that required public employees to subsidize a union, regardless of whether or not they chose to join or strongly objected to the positions of the union in collective bargaining and related activities.[195] The Court found the provision violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.[196] States and public-sector unions, therefore, were no longer allowed to extract agency fees form nonconsenting employees.[197]

The dissent in *Janus* argued that the majority aggressively wielded the First Amendment and went against the settled framework of "evaluating claims that a condition of public employment violates the First Amendment."[198] This shows a pattern that the Court is willing to adjust case law as it sees fit, and unsettle settled areas of the law, to achieve their anti-union agenda. There were strong reasons presented by the dissent in *Janus* for permitting union access even when the employees are not living on site that are applicable to *Cedar Point.* For example, the dissent posited that "[t]he question of a union's right of entry onto employer property has become increasingly important as employers move to suburban locations to avoid the disadvantages of an urban environment. Such relocation often removes them from city streets, where unions can communicate easily with employees, to relatively isolated areas."[199] Further, the dissent discussed

---

[193] *Id.*
[194] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2487 (2018); *see also* Harris v. Quinn, 573 U.S. 616, 645 (2014) (holding that the First Amendment prohibited the collection of agency fees from personal assistants who did not want to join or support the union).
[195] *Janus*, 138 S. Ct. at 2460.
[196] *Id.*
[197] *Id.* at 2486.
[198] *Id.* at 2487 (Sotomayor, J., dissenting) ("The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech . . . in the interest of operating their workplaces effectively").
[199] David P. Van Knapp, Annotation, *Forbidding Access to Employer's Property as Unfair Labor Practice*, 26 A.L.R. FED. 153 (2021).

how "[e]mployees usually cannot effectively exercise their right to self-organization without outside counsel and information."[200] These reasons demonstrate the pressing need for farm workers to access their union representatives, and highlight how harmful the majority's decision is to the welfare of these workers.

C. The Impact of this Decision on Other Areas of Regulation

This decision could impair the ability of government agencies to come on to businesses' property to do necessary inspections. The majority argues that their decision will not "endanger a host of state and federal government activities involving entry onto private property."[201] There are three exceptions to the new rule, but the exceptions are vague and it is unclear how they will be applied to specific cases in the future.[202] The first exception is that "[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right."[203] The second exception is that government-authorized invasions will not be considered takings if "they are consistent with longstanding background restrictions on property rights."[204] The majority gives the example of how "the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place."[205] The third and final exception is that "[t]he government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking."[206] The majority argues that property owners will still have to allow access for health and safety inspections because "both the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to

[200] *Id.*
[201] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2078 (2021).
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*

satisfy" when the government conditions receipt of a permit on allowing access to the property for inspections.[207]

The dissent in *Cedar Point* discusses how this decision could now make simple matters, such as regulators entering private property, unnecessarily complicated.[208] The justices posit that "[t]he majority's conclusion threatens to make many ordinary forms of regulation unusually complex or impractical."[209] The majority's decision could have an impact on regulatory takings analysis moving forward that will be unknown until decisions are made based on *Cedar Point*.[210] This decision unsettles a settled area of the law. As noted by the dissent, "[t]he law has not, and should not, convert all temporary-access-permitting regulations into *per se* takings automatically requiring compensation."[211]

VII. CONCLUSION

Both property rights and farm workers need to be protected. The *Cedar Point* majority, however, is protecting the rights of farmers to keep union representatives off of their property for a few hours a day at the expense of workers who *are* vulnerable to employer abuses, as discussed in Part III of this Comment. The majority's anti-union bias is clear through the misapplication of case law to fit an anti-union agenda. The regulation at issue here does not constitute a permanent invasion onto private property, which would warrant the *per se* rule. This is a temporary access that does not detract from farm owners' property value or take away their property rights; workers have access to union organizers and still work the same number of hours they would have

[207] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2078 (2021).
[208] *Id.* at 2088 (Breyer, J., dissenting).
[209] *Id.* at 2081.
[210] *Id.*
[211] *Id.* at 2088.

otherwise. This regulation serves a greater public good and should not have been found to be a *per se* taking.

The Court should have evaluated *Cedar Point* under the *Penn Central* balancing test.[212] If it had done so, it would have found that the regulation at issue did not cross the line into being a taking that requires just compensation. There was no true economic impact on the farm owners because they can use their property in the same way they could prior to union organizers entering their property. Additionally, farmers can still expect profits from their farm regardless of the fact that union representatives are allowed on their property. Finally, this interference with property arises from a public program adjusting the benefits and burdens of economic life to promote the common good.[213] The regulation passes the balancing test with flying colors and thus, is not a taking.

[212] *See* Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).
[213] *Id*.