

University of Chicago Law School

Chicago Unbound

Coase-Sandor Working Paper Series in Law and
Economics

Working Papers

2023

Toward Principled Background Principles in Takings Law

Rebecca Hansen

Lior Jacob Strahilevitz

Follow this and additional works at: https://chicagounbound.uchicago.edu/law_and_economics_wp



Part of the **Law Commons**

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

Toward Principled Background Principles in Takings Law

Rebecca Hansen* & Lior Jacob Strahilevitz**

(forthcoming in 10 *Texas A & M Law Review* (2023))

Abstract

Blunders made by lawyers, judges, and scholars have caused the Supreme Court's recent opinion in *Cedar Point Nursery v. Hassid* to be deeply misunderstood. In *Cedar Point*, the Court re-wrote takings law by treating temporary and part-time entries onto private property as per se takings. Prior to *Cedar Point* these sorts of government-authorized physical entries would have been evaluated under a balancing framework that almost invariably enabled the government to prevail. As it happens, there were two well-established rules of black letter law that California's lawyers and amici mistakenly failed to invoke in defending the *Cedar Point* union organizer access regulation. First, a physical takings claim accrues when a regulation authorizing third parties to enter private property is promulgated, not when the third party actually enters the land. Second, only the party that owned the land at the time the physical taking cause of action accrued can prevail. Under these doctrines, *Cedar Point Nursery's* lawsuit was filed decades too late. By the wrong plaintiff. California's oversights were probably outcome determinative.

Moving beyond Monday-morning quarterbacking, we argue that the statute of limitations arguments available to governments in future cases help provide the essential limiting principles that went unmentioned in *Cedar Point*. In the aftermath of *Cedar Point* prominent scholars denounced the opinion as a vehicle for gutting antidiscrimination law, labor law, environmental law, rent control, and other parts of the regulatory state. Our analysis reveals that these concerns are likely exaggerated because defenders of those long-standing limits on the right to exclude can invoke the statute of limitations arguments that California's lawyers failed to raise. On the other hand, new restrictions on owners' rights to exclude are vulnerable to legal challenge. Properly understood, contemporary takings law grandfathers in many longstanding limits on the right to exclude while constraining governments that wish to tackle collective action problems by restricting property rights in new ways. Moreover, statutes of limitations and related doctrines can provide courts with something that has been elusive since the Supreme Court's 1992 takings decision in *Lucas v. South Carolina Coastal Council*: a principled and coherent account of what restrictions on owners' rights are impervious to takings claims because they qualify as background principles of state property law.

* Law Clerk to the Honorable Vincent Chhabria, United States District Court for the Northern District of California. The views expressed herein are those of the authors, not those of Judge Chhabria nor the United States government.

** Sidley Austin Professor of Law, University of Chicago. For helpful comments and conversations the authors thank Douglas Cole, Richard Epstein, Lee Fennell, Aziz Huq, Saul Levmore, Tim Mulvaney, Gideon Parchomovksy, Michael Pollack, Shitong Qiao, and workshop participants at Texas A & M Law School. Further thanks are owed to Emily Hall, Adrian Ivashkiv and Claire Haldeman for energetic research assistance. This research was supported by the Carl S. Lloyd Fund for Faculty Research at the University of Chicago.

Introduction

In *Lucas v. South Carolina Coastal Council*,¹ attorneys for the state of South Carolina made a colossal strategic blunder, providing a conservative Supreme Court with a golden opportunity to re-write Takings Clause jurisprudence. The result was a new per se rule that handed a major victory to property rights advocates and created immediate headaches for environmental regulators. After *Lucas* the government owes compensation whenever it deprives a landowner of all economically beneficial and productive uses of land, unless the deprivation is grounded in background principles of state property law.² Critically and indefensibly, South Carolina had failed to appeal a clearly erroneous trial court determination that the state's restrictions on new beachfront construction had wiped out the value of Lucas's land.³ In fact, the land retained substantial residual value, and the new constitutional rule that *Lucas* announced was inapplicable to the actual facts of the case.⁴

Nearly three decades later, in *Cedar Point Nursery v. Hassid*,⁵ attorneys for the state of California made a colossal strategic blunder, providing an even more conservative Supreme Court with a golden opportunity to re-write Takings Clause jurisprudence. The result was a new per se rule that handed a major victory to property rights advocates and created immediate headaches for union organizers and their allies. After *Cedar Point* the government owes compensation whenever it temporarily invades a landowner's property or authorizes third parties

¹ 505 U.S. 1003 (1992).

² *Id.* at 1027.

³ *Id.* at 1034 (Kennedy, J., concurring); *Id.* at 1076 (Souter, J., statement supporting dismissal of writ of certiorari as improvidently granted). Bill Want, who was brought on to defend the state in *Lucas* and later became a law professor at Charleston School of Law, explains his litigation strategy in Bill Want, *The Lucas Case: The Trial Court's Strategy and the Case's Effect on the Property Rights Movement*, 27 STAN. ENVTL. L. REV. 271 (2008). The article makes it clear that Want thought Lucas's claim was a slam dunk winner for the plaintiff, beginning in the trial court. It does not appear that he understood how favorable the then applicable *Penn Central* framework was to governments, such that if he could just convince the Court to apply existing law he might well have won. See generally James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 62-63 (2016) (showing that the government almost always wins under *Penn Central*, absent diminutions in value on the order of 85 to 90% or greater). Even accounting for hindsight bias it is difficult to avoid shaking one's head repeatedly as Want walks the reader through many of his fateful and questionable litigation strategy decisions. See, e.g., *id.* at 291 (describing Want's response to a loss in the trial court as a feeling of overwhelming "helplessness" that prompted him to go "through the motions" on appeal).

⁴ Jonathan S. Klavens, *At the Edge of Environmental Adjudication: An Administrative Takings Variance*, 18 HARV. ENVTL. L. REV. 277, 280 n.11 (1994); Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1412 (1992)

⁵ 141 S. Ct. 2063 (2021).

to do so, provided the invasion was not an isolated, one-time affair, the land at issue is not generally open to the public, and (echoing *Lucas*) the invasion is not authorized by background principles of state property law.⁶

Cedar Point Nursery is *The Force Awakens* of constitutional law. We saw basically the same film a generation ago, so perhaps we should have anticipated the big explosion at the end. Fascinatingly, however, early reviews of the most recent Takings Clause blockbuster tracked those of its predecessor.

Lucas, unquestionably the most significant Takings Clause case of the 1990s, prompted enormous alarm at the time it was handed down, with some scholars viewing it as a death knell for environmental regulation and a huge limitation on the government's ability to address collective action problems more generally.⁷ Within a few years, a much more sanguine conventional wisdom emerged,⁸ brought about by two complementary dynamics. *Lucas* turned to be important rather than revolutionary because it created a rule that few governments were foolish enough to violate.⁹ Government lawyers learned from South Carolina's error, regulating in a way that prevented states from having to compensate landowners whose rights were curtailed. Moreover, the Supreme Court, in subsequent decisions, clarified that a maximalist reading of *Lucas* (which would have imperiled huge parts of the American regulatory state) was not in the cards.

Cedar Point Nursery, unquestionably the most significant Takings Clause case of the 2020s (so far), has likewise prompted grave alarm among many since the day it was handed down too.¹⁰ Deep distress over what the precedent portends is the consensus view in the academic literature, though a healthy variety of perspectives have emerged. In this Article we bracket the question of whether *Cedar Point* was correctly decided in light of the arguments that were properly before the Supreme Court. It is sufficient to observe that a wide range of distinguished scholars expressed either the concern or the excitement (depending on their worldviews) that if the regulation at issue in that case – a rule requiring farmers to open up their

⁶ *Id.* at 2068, 2074, 2078-80.

⁷ See, e.g., J. Peter Byrne, *Ten Arguments for the Abolition of Regulatory Takings Doctrine*, 22 *ECOL. L.Q.* 89, 117 (1997); William W. Fisher III, *The Trouble with Lucas*, 45 *STAN. L. REV.* 1393, 1403-05 (1993); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 *STAN. L. REV.* 1433, 1455 (1993).

⁸ See JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL, AND LIOR JACOB STRAHILEVITZ, *PROPERTY* 1108 (10th Ed. 2022); Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 *FLA. L. REV.* 1165, 1165-1170 (2019).

⁹ DUKEMINIER ET AL., *supra* note 8, at 1109.

¹⁰ See, e.g., LINDA GREENHOUSE, *JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT* 224 (2021) (describing the case as a “potentially transformational development in the law of property rights . . . likely to hobble government land use regulation.”).

land to union organizers a few hours a day and a few months during the year – was a per se taking, then various antidiscrimination laws, anti-retaliation provisions, regimes governing union access to employer email systems, rent control ordinances, environmental protection laws, consumer protection laws, protections for disabled tenants, COVID eviction moratoria, and mandatory inspection regimes were in peril.¹¹ As Niko Bowie put it in the *Harvard Law Review*, “anti-discrimination laws, anti-retaliation laws, fair housing laws, all of these are vulnerable.”¹² Positivist arguments put forth to defend these mostly popular laws fail to persuade.¹³ Some scholars’ primary comfort was arguing that there weren’t clearly enough votes to gut antidiscrimination protections for workers and tenants.¹⁴ A conventional wisdom has yet to emerge regarding the nature of the threat *Cedar Point* poses to the regulatory state, and we do

¹¹ See, e.g., Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 196-200 (2021); Brandon Hasbrouck, *Movement Judges*, 97 NYU L. REV. 631, 647 (2022); Cynthia Estlund, *Showdown at Cedar Point: “Sole and Despotism” Gains Ground*, 2021 SUP. CT. REV.; Christina M. Rodriguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 124-25 (2021); Benjamin I. Sachs, *Safety, Health, and Union Access in Cedar Point Nursery*, 2021 SUP. CT. REV. 99, 102; Eduardo M. Peñalver, *The Obscure Case that Could Blow Up American Civil-Rights and Consumer-Protection Laws*, THE ATLANTIC, Mar. 25, 2021; Nikolas Bowie, *Do We Have to Pay Businesses to Obey the Law?*, N.Y. TIMES, Mar. 20, 2021; Richard A. Epstein, *A Bombshell Decision on Property Takings*, Defining Ideas, Hoover Institution, June 28, 2021, available at <https://www.hoover.org/research/bombshell-decision-property-takings>; Ilya Somin, *Eighth Circuit Rules Eviction Moratoria Are Likely to be Takings Requiring Just Compensation under the Fifth Amendment*, Volokh Conspiracy, April 9, 2022, available at <https://reason.com/volokh/2022/04/09/eighth-circuit-rules-eviction-moratoria-are-likely-to-be-takings-requiring-compensation-under-the-fifth-amendment/>. But cf. Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 DUKE J. CONST. L. & PUB. POL’Y 1 (2022) (identifying several ways in which the apparently sweeping scope of *Cedar Point* could be curtailed); Julia D. Mahoney, *Cedar Point Nursery and the End of the New Deal Settlement*, Univ. of Virginia Pub. L. & Legal Theory Research Paper No 2022-50, at 34 (July 2022) (arguing that “*Cedar Point* represents an evolution, not a revolution in the Court’s property rights jurisprudence” while celebrating the Court’s result and analysis).

¹² Nikolas Bowie Remarks at LPA Panel on the Implications of Cedar Point Nursery, Oct. 22, 2021, available at <https://lpeproject.org/blog/excerpt-implications-of-cedar-point-nursery/>

¹³ For example, Steven Eagle correctly notes that at common law innkeepers were required to accept all customers who behaved appropriately, and then argues that because of this background principle of common law, antidiscrimination protections are not vulnerable after *Cedar Point*. See STEVEN J. EAGLE, REGULATORY TAKINGS § 7-6(c)(2) (2022 Online Supplement to 5th ed. 2012). The problem is that these common carrier rules were circumscribed at common law. They did not apply to landlords or employers. Hence the old English precedents would be easily distinguished by jurists who were motivated to turn antidiscrimination protections for tenants (as opposed to hotel guests) into takings, and the fact that inns – unlike apartments – were generally open to the general public provides a further basis for distinguishing them under *Cedar Point*.

¹⁴ See, e.g., Bowie, *supra* note 12.

not know whether the Supreme Court will double down on *Cedar Point*'s per se rule after trimming *Lucas*'s sails a generation earlier.

But we do know one important thing. Government lawyers need not and should not repeat the mistake that California's lawyers made, a goof that evidently went unnoticed by all three dissenting justices, all thirteen amici, and every scholar who has written about *Cedar Point*.¹⁵ By correcting *Cedar Point*'s litigation strategy blunder, governments may avoid having to compensate landlords who want to refuse to rent to members of a protected class, landlords whose ability to evict is constrained by rent control laws, employers who wish to fire workers involved in unionization efforts, and business owners who want to bill governments for the inconvenience of having to endure entry by health and safety inspectors. Most of these claims brought by property owners should fail if defended by competent government counsel who can learn from California's error.

So what egregious error, akin to conceding that still-valuable land in *Lucas* had lost all its worth, could the Golden State's lawyers have made? The answer is straightforward: Cedar Point Nursery's claims were time-barred under well-established principles of black letter law. If the government authorizes a third party to enter private property, a Takings Clause cause of action arises when the statute or regulation that permits such entry is enacted, not at the (subsequent) date of the third party's entry onto the plaintiff's land. Moreover, a cause of action for a physical taking is not transferrable to a new owner of land. The regulation being challenged in *Cedar Point* was decades old, having been promulgated in 1975, long before Cedar Point Nursery's owners acquired the land (and long after the land had been zoned agricultural, though we don't think that should matter.¹⁶)

Cedar Point Nursery's lawsuit was filed decades too late. By the wrong plaintiff. California noticed neither of these fatal flaws in the plaintiff's case, thereby waiving both arguments on appeal and snatching defeat from the jaws of victory. Going forward, government lawyers can raise statute of limitations defenses. Barring a significant change in the black letter law, the government will win. Takings claims brought under *Cedar Point* to challenge parts of the Fair Housing Act, or the National Labor-Relations Act, or local rent control ordinances, or federal inspection regimes should be dead on arrival. Critics' darkest fears of *Cedar Point* probably will not materialize, at least for laws that are already on the books. Our analysis gives an easy and probably welcome escape hatch to justices who would prefer to expand property rights without mandating the politically unpalatable result of forcing governments to compensate racist landlords for overriding their discriminatory preferences.¹⁷

¹⁵ For another recent case in which the state government inexplicably failed to raise a statute of limitations defense against a takings claim based on state action that occurred in 1801[!], see *Schaghticoke Tribal Nation v. State*, 283 A.3d 508 (Conn. App. 2022). The state won, nonetheless, on sovereign immunity grounds. *See id.* at 515.

¹⁶ This is a thorny issue so further discussion is warranted. *See supra* note 141.

¹⁷ *Cf.* Fennell, *supra* note 11, at 18 (noting that turning ADA reasonable accommodations requirements into per se takings is unimaginable and would erode the Supreme Court's legitimacy while stating that it is challenging to explain why those provisions wouldn't be takings under *Cedar Point*). In our estimation, among the justices in the *Cedar Point* majority,

Prospectively, the story is different. The logic of our argument holds that newly enacted laws authorizing third parties to enter private property could be vulnerable to *Cedar Point* challenges. So the real challenge of *Cedar Point* has little to do with what the government has already done and everything to do with what the government might have up its sleeve. *Cedar Point* substantially curtails the ability of governments to respond to new collective action problems with novel laws and regulations authorizing physical invasions of property interests. The resulting and potentially worrisome ossification is where the most interesting action should be in the post-*Cedar Point* period.

This Article proceeds as follows. Part I explains the Court's existing takings jurisprudence and its decision in *Cedar Point*. Part II explains that, following *Cedar Point*, takings claims based on access regulations still accrue immediately, triggering the statute of limitations. It then asks whether existing doctrines—the continuing violations doctrine, equitable tolling, or the accrual suspension rule—might be used to suspend the statute of limitations for otherwise untimely claims. Part III then discusses the rule barring subsequent purchasers from challenging past physical takings and the application of this rule to *Cedar Point*. Finally, Part IV examines the justifications for the black letter rules that physical takings claims accrue at the time the government enacts a rule authorizing a third party's entry, and that physical takings claims do not run with the land. It further considers whether existing justifications for the disparate treatment of regulatory and physical takings still hold water after *Cedar Point*.

I. Takings Jurisprudence Before and After *Cedar Point*

A. Pre-*Cedar Point* Takings Jurisprudence: Per Se Rules and a Catch-all

The Fifth Amendment's Takings Clause, made applicable to states and localities through the Fourteenth Amendment, states: "Nor shall private property be taken for public use, without just compensation."¹⁸ This clause prohibits the government from acquiring property through eminent domain without payment. In *Pennsylvania Coal v. Mahon*, the Court additionally held that it prohibits the government from burdening property in ways that are "functionally

Chief Justice Roberts, Justice Kavanaugh, and Justice Barrett, at least, seem unlikely to relish imposing an obligation on the government to compensate landowners when it enforces antidiscrimination law. The *Cedar Point* majority's favorable invocation of *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964), which held the Civil Rights Act of 1964 to be a non-taking, is a good clue in that regard. If that legal realist reading of the justices is right, the question becomes whether *Cedar Point* and its progeny might doctrinally box them in to imposing such an obligation.

¹⁸ U.S. Const. amend. V.

equivalent” to a classic eminent domain taking.¹⁹ The new theory of the Takings Clause’s applicability that emerged in *Mahon* is known as “implicit” or “regulatory takings.”²⁰

Prior to *Cedar Point*, there were three per se rules for regulatory takings, and the remainder of regulatory takings were subject to a deferential balancing framework. The first, and oldest, of the per se rules stems from a line of cases that begins with *Patterson v. Kentucky*,²¹ then runs through *Fertilizing Company v. Hyde Park*,²² *Mugler v. Kansas*,²³ *Hadacheck v. Sebastian*,²⁴ and *Keystone Bituminous Coal Association v. DeBenedictis*,²⁵ to name the most relevant precedents. The rule that emerged from these cases is that when the government regulates in a way that substantially reduces a property’s value it need not compensate the owner if the owner’s use of their property was noxious.²⁶ Noxious uses are those that create substantial negative externalities for society.

The second per se rule comes from *Loretto v. Teleprompter*,²⁷ in which a landlord challenged the placement of permanent cable wires and boxes on her property. The government did not think it needed to exercise eminent domain, and Loretto brought an inverse condemnation suit. The Court held that, where the government’s action results in a “permanent physical occupation of property” there is a per se taking, regardless of the size of the invasion or the state’s purpose.²⁸ The *Loretto* Court was careful to distinguish between “permanent physical occupations” and “temporary limitations on the right to exclude.”²⁹ Such temporary limitations “do not absolutely dispossess the owner of his rights to use, and exclude others from his property,” and they “are subject to a more complex balancing process to determine whether they are a taking.”³⁰ Consistent with this principle, the Court distinguished the cable requirement from regulations requiring companies to permit access to union organizers under the National Labor

¹⁹ 260 U.S. 393 (1922). For more on *Mahon*, see Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); William M. Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813 (1998)

²⁰ Fennell, *supra* note 11, at 3

²¹ 97 U.S. 501 (1878).

²² 97 U.S. 659 (1878). For much more on *Fertilizing Company*, see Lior Jacob Strahilevitz, *Hyde Park’s Two Turns in the Takings Clause Spotlight*, 50 J. LEGAL STUD. 571 (2021).

²³ 123 U.S. 623 (1887).

²⁴ 239 U.S. 394 (1915).

²⁵ 480 U.S. 470 (1987).

²⁶ See, e.g., *Mugler*, 123 U.S. at 668-69.

²⁷ 458 U.S. 419 (1982).

²⁸ *Id.* at 434-35.

²⁹ *Id.* at 435 n.12.

³⁰ *Id.* at 435 n.12.

Relations Act (NLRA).³¹ Under the NLRA, access “is limited to (i) union organizers; (ii) prescribed non-working areas of the employer’s premises; and (iii) the duration of the organization activity.”³² Given these limits, “the ‘yielding’ of property rights [the NLRA] may require is both temporary and limited,” and so it is distinguishable from a permanent physical occupation.³³ As recently as 2012, the Supreme Court reaffirmed the principle that temporary physical invasions did not fall under *Loretto*’s per se rule.³⁴

The third per se rule comes from the case with which we began, *Lucas v. South Carolina Coastal Council*.³⁵ There, the Court held that when a regulation deprives an owner of “all economically beneficial or productive use of land,” it is automatically a taking.³⁶ This per se rule “generated larger conceptual problems” than the rule in *Loretto*.³⁷ For one, “[i]t is impossible to say whether ‘all’ of something has been taken without knowing ‘all of what.’”³⁸ The Court’s subsequent precedents attempted to explain how to determine the denominator in these contexts.³⁹

Harkening back to “noxious use” cases like *Mugler* and *Hadacheck*, *Lucas* also established that, where a regulation merely codifies “background principles” that already limit a property owner’s use of the property, there is no taking even if the owner suffers a total wipeout of property value.⁴⁰ To fall under this exception, the restriction must “inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”⁴¹ Though this reading is not inevitable, *Lucas* arguably narrowed the scope of the *Mugler* line of cases, by focusing on nuisances rather than “noxious uses.”⁴²

³¹ *Id.* at 434 n.11.

³² *Id.* at 434 n.11 (quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972)).

³³ *Id.* 434 n.11.

³⁴ *See* *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23, 38–39 (2012).

³⁵ 505 U.S. 1003 (1992).

³⁶ *Id.* at 1015.

³⁷ Fennell, *supra* note 19, at 4.

³⁸ *Id.*

³⁹ For more on the conceptual severance problem (also known as the denominator problem) in takings, see Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents and the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988); Laura S. Underkuffler, *Tahoe’s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COM. 727 (2006).

⁴⁰ *Lucas*, 505 U.S. at 1029.

⁴¹ *Id.* at 1029.

⁴² More precisely, it is unclear whether *Lucas*’s re-characterization of the *Mugler* line of cases applies only to the “background principles” exception to *Lucas*’s per se rule or reflected a change in the way the Court understood the *Mugler* cases more generally. One can read *Lucas* as saying that the state’s obligation to pay compensation is only excused when the state is

(After all, not all noxious uses are nuisances.) *Lucas* seems to refer to principles from common law: the “law or decree . . . must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.”⁴³ It also refers to pre-existing physical takings: the Court explained it would “assuredly . . . permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner’s title.”⁴⁴ Subsequent lower court opinions have held that statutes can also constitute such background principles.⁴⁵

In *Palazzolo v. Rhode Island*,⁴⁶ the Court clarified that a law does not become a background principle merely because the property owner acquired the property after the law had taken effect.⁴⁷ As Justice Kennedy put it, a “law does not become a background principle for subsequent owners by enactment itself.”⁴⁸ The Court did not elaborate on the circumstances under which a law might become a background principle, but “suffice[d] to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title.”⁴⁹ The Court went on to say, “A regulation or common-law rule cannot be a background principle for some owners but not for others.”⁵⁰ In *Tahoe-Sierra*, decided a year after *Palazzolo*, the Court held that background principles are not limited to common law rules but also include administrative practices like zoning restrictions and ordinary delays in issuing building permits or variances.⁵¹ But since then, the Court has not explained under what circumstances an existing law could become a background principle. Enormous confusion about how to identify background principles has resulted.⁵² Absent some rational nexus to a law’s longevity, the notion of

preventing land uses that would be nuisances. Alternatively, one can read *Lucas* more narrowly, so that it’s only applicable to a government defense that arises in cases where the owner’s property interest has been wiped out. Under the narrower reading of *Lucas*, the government would not owe compensation if it acted to prevent the owner’s harmful uses of land that did not rise to the level of nuisances. Since *Lucas* no Supreme Court case has examined the relationship between noxious uses and nuisances in any depth.

⁴³ *Lucas*, 505 U.S. at 1029.

⁴⁴ *Id.* at 1028–29.

⁴⁵ See generally Blumm & Wolfard, *supra* note 8, at 1165.

⁴⁶ 533 U.S. 606 (2001).

⁴⁷ *Id.* at 629.

⁴⁸ *Id.* at 630.

⁴⁹ *Id.* at 629–30.

⁵⁰ *Id.* at 630.

⁵¹ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 343, 351–52 (2002) (Rehnquist, C.J., dissenting)

background principles becomes an empty vessel, a stand-in for judges' naked ideological preferences.

If the government's action does not fall under any of these per se rules, it is analyzed under the fact-specific balancing framework developed in *Penn Central Transportation v. City of New York* ("*Penn Central*").⁵³ Under *Penn Central*, courts look to (1) the economic impact of the regulation; (2) the extent to which it has interfered with distinct, investment-backed expectations; and (3) the "character" of the government action.⁵⁴ As to the last factor, the Court explained, "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."⁵⁵ Thus, "the physicality of a governmental burden remained potentially relevant under the 'character' prong of *Penn Central* whenever something short of a permanent occupation was involved."⁵⁶ Under *Penn Central*'s "squishy test,"⁵⁷ the vast majority of takings challenges fail.⁵⁸ The *Penn Central* test is extremely favorable to the government, such that if none of the per se takings rules apply a property owner is unlikely to prevail absent a near-total loss of value.⁵⁹

B. *Cedar Point* and the Transformation of Temporary Physical Invasions

The takings framework described in Part I.A held "relatively stable" until *Cedar Point*.⁶⁰ In *Cedar Point*, the Court considered a takings challenge to a California regulation allowing union organizers to access private property. The California Agricultural Labor Relations Act of 1975 makes it an unfair labor practice to interfere with agricultural employees' right to self-organization.⁶¹ After the Act took effect, California's Agricultural Labor Relations Board enacted a regulation granting a "right of access" to union organizers, with certain limitations.⁶² The regulation was first promulgated in 1975, and, while certain restrictions have been imposed

⁵² See Blumm & Wolfard, *supra* note 8, at 1169, 1182; Robert L. Glicksman, *Swallowing the Rule: The Lucas Background Principles Exception to Takings Liability*, 71 FLA. L. REV. 121, 126-140 (2020); Andrew S. Gold, *The Diminishing Equivalence between Regulatory Takings and Physical Takings*, 107 DICKINSON L. REV. 571, 577 (2003).

⁵³ 438 U.S. 104 (1978).

⁵⁴ *Id.* at 124.

⁵⁵ *Id.* at 124.

⁵⁶ Fennell, *supra* note 19, at 5.

⁵⁷ *Id.* at 4.

⁵⁸ James E. Krier and Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 88 (2016); Mahoney, *supra* note 11, at 12.

⁵⁹ *See supra* note 3.

⁶⁰ Fennell, *supra* note 19, at 5.

⁶¹ *Cedar Point*, 141 S. Ct. at 2069 (citing Cal. Lab. Code §§ 1152, 1153(a)).

⁶² *Id.*

in the years since, it has remained in its current form since 1985.⁶³ The current regulation permits labor organizers to “take access” to an agricultural employer’s property for a maximum of 3 hours per day—one hour before work, one hour during employees’ lunch break, and one hour after work—for up to four 30-day periods per year.⁶⁴ Access is limited to areas of the property where “employees congregate before and after working” or where “employees eat their lunch.”⁶⁵ To “take access,” the organizers must file written notice with the Board and serve a copy to the employer, but upon doing so the union has an immediate right to access. The regulation provides the government with no discretion to deny the union access.⁶⁶ Interference with the right of access may constitute an unfair labor practice, which can result in sanctions.⁶⁷

Opponents of the 1975 law and regulations immediately challenged them in court, alleging that they were unconstitutional takings, due process violations, or, in the alternative, unlawful trespasses. A trial court enjoined the regulation but the California Supreme Court reversed in *Agricultural Labor Relations Board v. Superior Court*.⁶⁸ The court rejected the takings claim on the basis of decades of Supreme Court and federal appellate court decisions that had held that when there was a conflict between workers’ rights to receive information about unionization and their employers’ property rights to exclude, the former generally prevailed over the latter.⁶⁹ It rejected the due process claim after applying rational basis review,⁷⁰ and it held that any entries by union organizers were not trespasses under California law because the statute authorizing organizer access should be understood as a limited exception to the broadly applicable trespass statutes.⁷¹ Thus, by 1976, California law was clear – a union organizer’s entry onto private property for the purposes of speaking with workers considering unionization was neither a trespass nor a taking. California property owners had no right to exclude such entrants.

To be sure, the California Supreme Court thought that *Agricultural Labor Relations Board* presented a close case, with the court splintering four-to-three. But even the dissenters in that case took the position that many union organizer entries onto private property would be constitutionally permissible. In their view, though, the government had failed to show that the union organizers lacked reasonable alternative channels to communicate with the workers off the plaintiff’s property.⁷² As Justice Clark’s dissent saw it, the *Agricultural Labor Relations Board* had embraced a per se rule in which union access to private property always trumped property

⁶³ See 8 Cal. Code. Reg. § 20900 (Notes).

⁶⁴ 8 Cal. Code Reg. § 20900(e)(3)(A)–(B).

⁶⁵ *Id.*

⁶⁶ § 20900(e)(1)(B).

⁶⁷ *Cedar Point*, 141 S. Ct. at 2069.

⁶⁸ 549 P.2d 687, 692, 699 (Cal. 1976).

⁶⁹ *Id.* at 696.

⁷⁰ *Id.* at 699.

⁷¹ *Id.* at 706.

⁷² See *id.* at 706, 713 (Clark, J., dissenting).

owners' right to exclude. A case-by-case balancing approach was more appropriate in the dissenters' view.⁷³ Concurring in *Cedar Point Nursery* decades later, Justice Kavanaugh explained that in his view "Justice Clark had it exactly right."⁷⁴ If workers both lived and labored on the owner's property, then denying union organizer access to the land deprived them of the "reasonable means of communicating with the employees," but because Cedar Point's workers were housed elsewhere, there was not a sufficiently powerful justification to overcome the owners' right to exclude.⁷⁵

The twin disputes that arose in *Cedar Point Nursery* began forty years after the regulation being challenged was promulgated and thirty-nine years after *Agricultural Labor Relations Board* held that under state and federal law it was neither a taking nor a trespass. In July 2015, Fowler Packing, a California fruit grower, prevented United Farm Workers organizers from accessing its property.⁷⁶ The union filed an unfair labor practice charge against Fowler, but the charge was subsequently withdrawn.⁷⁷ In October 2015, United Farm Workers organizers entered Cedar Point Nursery's property without the required notice.⁷⁸ Cedar Point Nursery filed a charge against the union for failing to provide this notice, and the union, in turn, alleged that Cedar Point Nursery had engaged in an unfair labor practice.⁷⁹ According to the Complaint, this was Cedar Point Nursery's first interaction with United Farm Workers, but the record is silent as to Fowler Packing's history with the union.⁸⁰

⁷³ *Id.* at 713.

⁷⁴ *Cedar Point*, 141 S. Ct. at 2080, 2081 (Kavanaugh, J., concurring).

⁷⁵ *Id.* at 2080. Under Justice Kavanaugh's view, restrictions on the right to exclude like those at issue in the famous case of *State v. Shack*, 277 A.2d 369 (N.J. 1971), presumably would not be per se takings because the farm workers in *Shack* both lived and worked on the owner's property. Making the distinction between tenant farmworkers and farmworkers who live off the property dispositive raises new problems though. The migrant farmworkers in *Cedar Point Nursery* lived at various hotels in Klamath Falls, Oregon during the growing season. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 528 (9th Cir. 2019). Suppose that the nursery agrees to pay the hotels for the workers' lodging costs but insists as a condition that the hotels exclude union organizers from entering the hotel grounds. Should courts analyze that set of facts as akin to *Shack*, in which a restriction on Cedar Point Nursery's exclusion rights is constitutionally permissible? Or is Justice Kavanaugh articulating a per se test based on where the workers reside? If the latter, then the possibility of collusion between employers and hotels creates an obvious loophole that employers will exploit.

⁷⁶ *Cedar Point*, 141 S. Ct. at 2069–70.

⁷⁷ *Id.* at 2069–70.

⁷⁸ *Id.* at 2069–70.

⁷⁹ *Id.* at 2069–70.

⁸⁰ Complaint at 5, *Cedar Point*, 141 S. Ct. 2063 (No. 1:16-CV-00185) (hereinafter "Compl.").

Concerned that the union organizers would seek to enter their property again, Cedar Point Nursery and Fowler Packing sought declaratory and injunctive relief prohibiting the Board from enforcing the regulation against them. They argued that the access regulation constituted a per se taking in violation of the Fifth Amendment because it granted union organizers an “easement . . . to enter [their] private property without consent or compensation[.]”⁸¹

By the time the case reached the Ninth Circuit, the plaintiffs shifted emphasis from arguing that the government had seized an easement and that this amounted to a per se taking, instead emphasizing that the government had authorized the unions to enter their land and the resulting physical invasion was a per se taking because it had no end date.⁸² The Ninth Circuit held that the access regulation was not a per se taking because it did not authorize a permanent physical occupation.⁸³ The court explained that, unlike a traditional easement, it did “not grant union organizers a ‘permanent and continuous right to pass to and fro.’”⁸⁴ Rather, “[t]he regulation significantly limit[ed] organizers’ access to the Growers’ property.”⁸⁵ Moreover, whereas a permanent physical occupation “chops through the bundle [of property rights], taking a slice of every strand,” the access regulation only affected the right to exclude.⁸⁶

At its core, the plaintiffs and the circuit court seemed to disagree over what counted as a *Loretto* permanent occupation. As the plaintiffs saw it, the absence of an end date made the California regulation a per se taking. As the defendant and court saw it, the fact that the invasion did not persist for 24 hours a day, 7 days a week rendered *Loretto* inapplicable.⁸⁷ It would have been clarifying for the court to differentiate between permanent and temporary invasions (which turn on the presence or absence of an end-date) and full-time versus part-time invasions (which turn on whether the government’s entry is continuous or sporadic). A physical invasion could be permanent and part-time (as in *Cedar Point*) or temporary and full-time (as in a case involving seasonal flooding from a government dam). *Loretto* itself was a permanent and full-time

⁸¹ Compl. at 9.

⁸² *Cedar Point Nursery v. Shiroma*, 956 F.3d 1162, 1164 (9th Cir. 2020) (Paez, J., concurring in the denial of rehearing en banc); Appellant’s Opening Brief in *Cedar Point Nursery v. Gould*, 2016 WL 7115146, at 18-19. Judge Ikuta would have found a per se taking because in her view the state appropriated an easement in gross. See *id.* at 1165, 1168-75 (Ikuta, J., dissenting from denial of rehearing en banc).

⁸³ *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 530 (9th Cir. 2019).

⁸⁴ *Id.* at 532 (quoting *Nollan v. California Coastal Comm’n*, 438 U.S. 825, 832 (1987)).

⁸⁵ *Id.* at 533.

⁸⁶ *Id.* at 532 (quoting *Loretto*, 458 U.S. at 435).

⁸⁷ See, e.g., Answering Brief of Appellees William B. Gould et al., 2017 WL 495281, at *16-*19 (“Unlike the taking in *Loretto*, the access regulation here does not sanction the permanent physical occupation of property. Instead, it authorizes temporary admission to the employer’s property bound by strict time, place, and manner limitations. . . . The Growers mistakenly focus on how long the access regulation will be in operation rather than on how long, and under what limits, union organizers may access the Growers’ worksites.”).

invasion. In contrast, a temporary and part-time invasion occurs when a police officer chases a fleeing suspect through a homeowner's backyard. Neither the judges nor the litigants provided a clear-headed analysis of how these two variables relate to each other, and which ones (beyond *Loretto*) should be governed by per se tests.

The Supreme Court granted certiorari and then reversed. The Court held that the access regulation constituted a per se physical taking, rather than a regulatory taking subject to *Penn Central*.⁸⁸ The Court explained, "Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude."⁸⁹ Notwithstanding the name "regulatory takings," the Court emphasized, a "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation."⁹⁰ The access regulation fell into this category.

The Court insisted that its conclusion was consistent with previous precedents in which "intermittent" as opposed to "continuous" invasions were still categorized as takings.⁹¹ For instance, the Court cited *Nollan v. California Coastal Comm'n*,⁹² which involved a requirement that the Nollans permit the public to pass through their beachfront property. The *Cedar Point* Court explained, "What matters is not that the easement notionally ran round the clock, but that the government had taken a right to physically invade the Nollans' land. And when the government physically takes an interest in property, it must pay for the right to do so. The fact that a right to take access is exercised only from time to time does not make it any less a physical taking."⁹³

Consistent with its characterization of the access regulation in *Cedar Point* as a physical taking, the Court described it as granting a kind of quasi-easement. The Court acknowledged that the regulation did not appropriate a "true easement in gross under California law because the access right may not be transferred, does not burden any particular parcel of property, and may not be recorded."⁹⁴ The Court, however, dismissed the notion that the access regulation was not a per se taking just because it "appropriate[ed] the growers' right to exclude in a form that [was] a slight mismatch from state easement law."⁹⁵ "For much the same reason, in *Portsmouth, Causby*, and *Loretto* we never paused to consider whether the physical invasions at issue vested the intruders with formal easements according to the nuances of state property law . . . Instead, we followed our traditional rule: Because the government appropriated a right to invade,

⁸⁸ *Cedar Point*, 141 S. Ct. at 2072.

⁸⁹ *Id.* at 2072.

⁹⁰ *Id.* at 2072.

⁹¹ *Id.* at 2075.

⁹² 438 U.S. 825 (1987).

⁹³ *Cedar Point*, 141 S. Ct. at 2075.

⁹⁴ *Id.* at 2075.

⁹⁵ *Id.* at 2076.

compensation was due.”⁹⁶ Under this “intuitive approach,”⁹⁷ when the government appropriates the right to exclude, a taking occurs, even if the intrusion does not result in an interest recognized by state law. By extending *Loretto*’s per se rule to cover situations that were previously governed under *Penn Central*’s balancing test, the majority moved the law incrementally towards Richard Epstein’s expansive vision of the Takings Clause’s reach.⁹⁸

Conscious of the potential for the per se rule to threaten existing regulations allowing entry onto private land, the Court offered three explicit exceptions and one implicit exception to the rule.⁹⁹ First, the Court distinguished between trespass and physical takings: “Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right.”¹⁰⁰ Here the Court is deeming temporary, part-time invasions to be non-takings.

Second, the Court reaffirmed its holding in *Lucas* that physical invasions consistent with “longstanding background principles on property rights” do not qualify as takings.¹⁰¹ The Court explained, “These background limitations also encompass traditional common law privileges to access private property.”¹⁰² These include entering property to affect an arrest or enforce criminal law, to engage in a reasonable search, or because of public or private necessity.¹⁰³

Third, “the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking” so long as the condition bears an “‘essential nexus’ and ‘rough proportionality’ to the impact of the proposed use of property.”¹⁰⁴ Applying this framework from a trio of earlier cases involving unconstitutional exactions, the Court suggested most government health and safety inspections would not qualify as takings.¹⁰⁵

⁹⁶ *Id.* Scholars on both the right and left have noted that *Cedar Point*’s characterizations of the Court’s previous decisions are very difficult to reconcile with the precedents themselves. See, e.g., Epstein, *supra* note 11; Estlund, *supra* note 11, at 138-140.

⁹⁷ *Cedar Point*, 141 S. Ct. at 2076.

⁹⁸ Though the Court once again lands well short of what Epstein regards as the promised land. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 93-104, 281-82 (1985).

⁹⁹ *Id.* at 2078–80.

¹⁰⁰ *Id.* at 2078.

¹⁰¹ *Id.* at 2079.

¹⁰² *Id.* at 2078.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* A more elegant defense of many government inspection regimes is the idea that while mandated entries by government inspectors are physical takings, the inspection regimes enhance the value of the owner’s property, for example by promoting public confidence in the safety of any goods produced, or by spotting dangerous situations that may prompt injuries to

Fourth, the Court emphasized that the government was on stronger footing when it mandated third party access to private property that was already open to the public.¹⁰⁶ This part of *Cedar Point* allowed the Court to distinguish its earlier precedent in *Pruneyard Shopping Center v. Robins*.¹⁰⁷ In *PruneYard*, the Court applied *Penn Central* to a requirement that a privately owned shopping center allow third parties to distribute leaflets on its property.¹⁰⁸ (The Court then held there was no taking under *Penn Central*.)¹⁰⁹ The *Cedar Point* Court explained, such “[l]imitations 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.”¹¹⁰ The Court’s explanation suggests that, when the government grants a right of access to property already open to the public, *Cedar Point*’s per se rule does not apply. The Court suggested that civil rights laws prohibiting discrimination in places of public accommodation would fall into this category.¹¹¹

The Court then found that none of these exceptions applied to the regulation at issue. First, the regulation granted a formal and recurring right of access, and so it was not a trespass.¹¹² Second, even though the regulation had been in effect since 1975, it did not qualify as a background principle of law: “Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises.”¹¹³ Third, “the access regulation [was] not germane to any benefit provided to agricultural employers or any risk posed to the public,” and so California could not require the access right as

workers and resulting liability. These benefits may function as implicit in-kind compensation. Compare EPSTEIN, *supra* note 98, at 195-199. If a government inspection is less effective or less efficient than a private inspection regime serving the same interests would be, then the government might still owe compensation.

¹⁰⁶ *Cedar Point*, 141 S. Ct. at 2076-77.

¹⁰⁷ 447 U.S. 74 (1980).

¹⁰⁸ *Id.* at 82–83.

¹⁰⁹ *Id.* at 83–84.

¹¹⁰ *Cedar Point*, 141 S. Ct. at 2077.

¹¹¹ *See id.*

¹¹² *Id.* at 2080. Ben Sachs is sharply critical of this aspect of the Court’s ruling because he believes that the union access restriction passes muster under the law governing exactions. See Sachs, *supra* note 11, at 104-123 (arguing that the California union access regulation protects workers against employer violence, which has been common during unionization campaigns, and helps ensure that legal protections against pesticide exposure are followed, serving a role that complements government health and safety inspections).

¹¹³ *Cedar Point*, 141 S. Ct. at 2080.

a condition of receiving some benefit.¹¹⁴ Finally, the fruit growers' property was not open to the general public, and so it did not fall under the *Pruneyard* exception.¹¹⁵

The Court's determination that the California union access rule was not a background principle of state property law is puzzling given that the statute and regulation were nearly fifty years old by the time the Court decided *Cedar Point*. If that pedigree isn't enough, it's unclear how old a law has to be before it becomes a background principle.¹¹⁶ The Court never really explained this aspect of its ruling. All it did was contrast the access regulation with other kinds of restrictions that it did regard as inhering in title, such as those resulting from nuisance law, the common law of necessity, and the right of law enforcement to arrest someone, enforce the criminal law, or conduct a lawful and reasonable search of the premises.¹¹⁷

Understandably, many observers were unnerved by Chief Justice Roberts' decision to brush aside the notion that the California regulation – just seven years younger than the Fair Housing Act – was a background principle of state property law, unnerved many observers. If the 1975 California statute and regulation do not count by 2021 as background principles that inhere in title why shouldn't the 1968 Fair Housing Act suffer the same fate? The response to *Cedar Point* from the least alarmed property scholars fell back on the idea that the Court would nonetheless treat the Fair Housing Act as a background principle.¹¹⁸ But no one has a good theory – other than a realist reading of the justices' relative hostility to the goals of labor law – for why something magical happened between 1968 and 1975. After *Cedar Point* it is quite challenging to conclude that there are *any principles at all* underlying the Supreme Court's conception of background principles.¹¹⁹ Our goals in this article include articulating coherent principles that are grounded in existing law and consistent with what the Court decided in *Cedar Point*.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2076.

¹¹⁶ See generally Blumm & Wolfard, *supra* note 8, at 1207 (concluding, after reviewing many cases involving the “background principles” exception to liability under *Lucas* that the “cases do not reveal how old a statutory provision must be to qualify as a background principle, but there is evidence to suggest that forty years is sufficient”).

¹¹⁷ *Id.* at 2079. Although he couched the argument to be relevant to the *Cedar Point* majority's exactions exception, Justice Breyer's dissent made an argument that might be relevant to the “background principles” exception as well. The government need not compensate landowners when it acts to enforce background principles of state property law by, for example, preventing nuisances or promoting orderly zoning processes. These public benefits justify the restrictions on an owner's rights. Breyer wondered why labor peace isn't an equally compelling public interest. See *Cedar Point*, 141 S. Ct. at 2089 (Breyer, J., dissenting).

¹¹⁸ See, e.g., Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J. ____ (forthcoming 2023).

¹¹⁹ See *id.* (suggesting that, especially after *Cedar Point*, the Supreme Court's definition of “background principles” is unpredictable and not fully coherent).

Cedar Point is the most consequential Takings Clause decision since *Tahoe-Sierra* in 2002.¹²⁰ For many Property students, *Cedar Point* will be the last case they read on the syllabus.¹²¹ Our argument here, that the mistakes lawyers make affect what cases go to the Supreme Court, how the justices understand them, and how far-reaching their implications will be, is a fitting place to end a class that tens of thousands of first-year law students take each year.

C. The Substantive Implications of *Cedar Point*

While the Court tried to cabin its holding in *Cedar Point*, its critics warned that it would disturb decades of laws. Justice Breyer, in dissent, expressed concern that the majority would threaten health and safety regulations allowing state access for everything “from examination of food products to inspections for compliance with preschool licensing requirements.”¹²² Critics charged that *Cedar Point* could also upend antidiscrimination, antiretaliation, and environmental laws.¹²³

Take antidiscrimination law. Many civil rights laws that prohibit discrimination in places of public accommodation might fall under the *PruneYard* exception, but “much of antidiscrimination law regulates exclusion decisions on private property that is *not* open to the general public.”¹²⁴ As Lee Fennell has explained, “Title VII and the Fair Housing Act forbid discrimination (with narrow exceptions) in employment and housing, respectively, reaching even the most access-restricted residential, commercial, and industrial land.”¹²⁵ Additionally, some civil rights laws require landowners to allow those with disabilities to bring assistive devices,

¹²⁰ 535 U.S. 302 (2002). The major landmarks since *Tahoe* are *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013) and *Horne v. Department of Agriculture*, 576 U.S. 350 (2015). *Koontz* turns out not to be hugely consequential because governments can deny development permits outright and put the onus of making concessions onto real estate developers. Like *Lucas*, it’s a rule that governments advised by competent counsel can live with. *Horne*’s rule extending *Loretto* to personal property is conceptually important but government seizures of personal property not covered by *Horne* exceptions (like civil asset forfeiture rules) are relatively rare.

¹²¹ The best-selling property casebook, Dukeminier and Krier’s book, ends with *Cedar Point*. DUKEMINIER ET AL., *supra* note 8, at 1154. *Cedar Point* is the penultimate case in the second best-selling casebook, JOSEPH WILLIAM SINGER, BETHANY R. BURGER, NESTOR M. DAVIDSON, AND EDUARDO PEÑALVER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1202 (8th ed. 2021), which concludes with the topic of exactions.

¹²² *Id.* at 2087 (Breyer, J., dissenting). For a discussion of environmental inspection laws jeopardized by *Cedar Point*, see Adam Smith, *Inspections, Exceptions, and Expectations: Cedar Point and its Expansion of Regulatory Takings*, Env’t, Nat. Res., & Energy L. Blog, <https://law.lclark.edu/live/blogs/180-inspections-exceptions-and-expectations-cedar>.

¹²³ See *supra* note 11

¹²⁴ Fennell, *supra* note 19, at 12.

¹²⁵ *Id.* at 12–13.

service animals, and personal assistants onto private property.¹²⁶ Various prominent scholars posit that these foundational antidiscrimination laws are now suspect under *Cedar Point*.¹²⁷

Cedar Point skeptics announced that antiretaliation laws, too, could be in jeopardy. Such laws prevent employers from firing employees who engage in union activity.¹²⁸ Because most workplaces are closed to the public, the *PruneYard* exception would not apply.¹²⁹ To Niko Bowie, *Cedar Point*'s "holding could [thus] make it financially impossible for governments to protect people who want to democratize their workplaces by organizing workers who are vulnerable to being fired."¹³⁰ The force of this argument of course depends on the amount of compensation owed.¹³¹

The existing scholarship even may have missed some potential implications of *Cedar Point*. Federal environmental laws often prevent landowners from removing animals, plants, or even pollutants from their land. For instance, the Comprehensive Environmental Response, Compensation, and Liability Act, better known as CERCLA, prohibits certain parties from taking remedial action to remove pollutants from their land without approval from the Environmental Protection Agency.¹³² Justice Gorsuch, joined by Justice Thomas, has already indicated that "allow[ing] the federal government to order innocent landowners to house another party's pollutants involuntarily . . . invite[s] weighty takings arguments under the Fifth Amendment."¹³³ Under *Cedar Point*, even temporarily requiring a landowner to house pollutants under CERCLA could be a per se taking.¹³⁴

Cedar Point's fans have similarly argued that the decision could sweep away high-profile government actions like the COVID pandemic eviction moratorium.¹³⁵ The Eighth Circuit has

¹²⁶ *Id.* at 13.

¹²⁷ *See supra* note 11.

¹²⁸ Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 162 (2021).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Lee Fennell concludes that the compensation due to Cedar Point Nursery, based on the rental value of a fraction of the land large enough to fit one standing organizer, would be quite low. She pegs the average compensation due for each farm worker union organizer at just \$4.51 per year. See Fennell, *supra* note 11, at 56. Surely that is a price that many legislatures would be willing to pay, though if enough owners demand hearings to determine compensation, the administrative costs for the state could be significant, perhaps prohibitively so.

¹³² 42 U.S.C. §§ 9601–75.

¹³³ *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020) (Gorsuch, J., concurring in part and dissenting in part).

¹³⁴ For an argument that *Cedar Point* does not expand takings liability under CERCLA, see Ariana Vaisey, Comment, *The Right to Exclude: People, Animals, and Pollution*, 89 U. CHI. L. REV. 2149 (2022).

¹³⁵ See, e.g., Somin, *supra* note 11.

held that this argument is a plausible interpretation of *Cedar Point*, reversing a lower court's dismissal of those claims as a matter of law.¹³⁶ Federal district courts in Washington D.C. and Washington State reached the opposite conclusion, viewing the eviction moratorium as a regulation of an existing landlord-tenant relationship, more analogous to rent control laws than to the facts of *Cedar Point*.¹³⁷ And a roughly contemporaneous Eighth Circuit decision held *Cedar Point* inapplicable to a Minneapolis ordinance that prohibited landlords from rejecting prospective tenants purely on the basis of their criminal records, credit, or rental history.¹³⁸ Critically, the CDC eviction moratorium and the Minneapolis ordinance are new laws, not longstanding ones. So while we argue that challenges to longstanding antidiscrimination provisions and antiretaliation provisions are time-barred, that argument is not obviously available to governments defending these newly implemented moratoria and antidiscrimination measures.¹³⁹

Setting aside recent legal developments like the eviction moratoria, there is an existing tool that prevents parties from bringing stale claims: the statute of limitations. At no point was a statute of limitations defense mentioned by any of the parties in *Cedar Point*. California made a ripeness argument in the trial court, but it abandoned that argument on appeal. When the Board moved to dismiss at the district court level, it emphasized the Court's then-existing takings jurisprudence: the regulation did not allow for a permanent occupation, and so it should be analyzed under *Penn Central*'s government-friendly balancing test. The District Court and the Ninth Circuit likewise focused only on the divide between temporary and permanent physical invasions. Neither party suggested there was any issue with the statute of limitations or the timing of the case. When the case reached the Supreme Court, no amici made this argument either. If the Board had invoked the statute of limitations or another timing argument, would the regulation have survived?

II. The Statute of Limitations Implications of *Cedar Point*

Though several scholars have considered *Cedar Point*'s substantive implications, its *per se* rule will also shape the timing of takings claims. A takings claim accrues—meaning the

¹³⁶ *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022).

¹³⁷ *Gallo v. District of Columbia*, ___ F. Supp.3d ___, available at 2022 WL 2208934 at *8-*10 (D.D.C. June 21, 2022); *Jevons v. Inslee*, 561 F. Supp.3d 1082, 1106-07 (W.D. Wash. 2021).

¹³⁸ *301, 712, 2103 and 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1383 (8th Cir. 2022).

¹³⁹ Interesting legal questions arise with respect to whether a restriction on property rights that is analogous to older common law restrictions but not identical to them counts as a background principle. This topic is thoughtfully explored in Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 874-77 (2013). Because there is ample room for judges to decide that restrictions are or aren't analogous based on their own ideological priors, we focus here on restrictions that themselves are old enough, as opposed to newer laws that are analogous to old enough restrictions.

statute of limitations begins to run—when the property is taken.¹⁴⁰ (So far so good.) Prior to *Cedar Point*, however, this could be a complicated inquiry for takings challenges based on access regulations. Courts had to apply *Penn Central*'s fact-specific balancing test to determine at what point the regulation rose to the level of a taking, if at all. After *Cedar Point*, there is no fact-specific balancing required. Part II.A explains that, consistent with *Cedar Point*'s per se rule, a property owner's takings claim accrues the moment the statute at issue is enacted or the regulation at issue is promulgated. Cedar Point Nursery's claim first accrued in 1975, and their land was already zoned for agricultural uses and thus subject to the regulation at that point.¹⁴¹ Part II.B explains under what circumstances courts will still be required to engage in fact-specific balancing. Finally, Part II.C explains the effects of this early accrual on takings challenges to existing laws.

A. Accrual Timing

Let's start with an easy case of accrual, inspired by the facts in *Nollan v. California Coastal Comm'n*.¹⁴² California enacts a law requiring a property owner to "make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach."¹⁴³ This is a per se physical taking, even before *Cedar Point*, because it authorizes a permanent physical occupation: "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."¹⁴⁴

As Gregory M. Stein explains in an analogous context, this law works a taking "the moment [it] becomes effective, even if no one ever actually uses the strip of land, because the [state] has appropriated the owner's power to exclude."¹⁴⁵ The owner's claim would thus ripen immediately, and "the statute of limitations . . . would begin to run at the same time, which means that if the owner were to wait too long to commence proceedings, her claim would expire."¹⁴⁶ The Supreme Court said so in *Chippewa Indians of Minnesota v. United States*, which held that where the federal government sold timber cut from land held in trust for the tribe, the date of the taking was day the statute permitting the logging was enacted by Congress, not the

¹⁴⁰ See, e.g., *Clark v. United States*, 126 Fed. Cl. 451, 457 (2016).

¹⁴¹ Email from Rachel Jereb, Senior Planner, County of Siskiyou, to Adrian Ivashkiv, June 28, 2022 (on file with author) (noting that the land owned by Cedar Point Nursery is zoned for Prime Agricultural (AG-1) uses and that the county has no records of it being zoned for any other use previously).

¹⁴² 483 U.S. 825 (1987).

¹⁴³ *Id.* at 831.

¹⁴⁴ *Id.* at 832.

¹⁴⁵ Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89, 100–01 (2000). See also *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 736 n.10 (1997).

¹⁴⁶ *Id.* at 100–01.

(much later) date when it became apparent that a government appraisal of the timber was too low.¹⁴⁷

Now consider a slightly harder case, drawn from the Federal Circuit's decision in *Fallini v. United States*.¹⁴⁸ Regulations under the Wild Free-Roaming Horses and Burros Act prohibit ranchers from fencing their water sources in ways that prevent wild horses from accessing that water, and ranchers allege the cost of providing water to these horses totals \$1 million.¹⁴⁹

When does the claim accrue? Unlike *Nollan*, the government has not appropriated a formal easement. One might argue that "every drink by every wild horse [is] a new and independent federal taking," triggering a new statute of limitations.¹⁵⁰ Or, taking a less ambitious approach, one might argue that the claim does not accrue until the first horse actually enters the land.¹⁵¹

The Federal Circuit has nonetheless analogized cases like this to *Nollan*: the takings claim accrues when the legislation is enacted, prior to the entry of any horse.¹⁵² "What the [ranchers] may challenge under the Fifth Amendment is what the government has done, not what the horses have done."¹⁵³ The only governmental action involved was the enactment of the statute "forbidding the [ranchers] from shoeing the horses away from the water."¹⁵⁴ "That governmental action cannot be regarded as recurring with every new drink taken by every wild horse, even though the consumption of water by the wild horses imposes a continuing economic burden on the [ranchers]."¹⁵⁵ As the *Fallini* court put it, "it is the enactment of the statute, not the individual intrusions by the horses, to which a court must look to determine if there has been a taking."¹⁵⁶

¹⁴⁷ 305 U.S. 479, 481-83 (1939).

¹⁴⁸ 56 F.3d 1378 (Fed. Cir. 1995)

¹⁴⁹ *Id.* at 1380.

¹⁵⁰ *Id.* at 1382.

¹⁵¹ The Federal Circuit did not discuss this argument in *Fallini*, but it rejected a similar argument in an analogous case. *See Goodrich v. United States*, 434 F.3d 1329, 1331 (Fed. Cir. 2006).

¹⁵² *Fallini* itself was somewhat ambiguous on the question of when exactly the claim accrued, but later Federal Circuit cases interpret it as holding the claim accrued when the statute was enacted. *See Goodrich*, 434 F.3d at 1334 ("The *Fallini* court determined that the statute of limitations was triggered upon the enactment of the Wild Free-Roaming Horses and Burros Act.").

¹⁵³ *Fallini*, 434 F.3d at 1383.

¹⁵⁴ *Id.* at 1383.

¹⁵⁵ *Id.* at 1383.

¹⁵⁶ *Id.*

In subsequent cases, the Federal Circuit expanded on the *Fallini* principle, explaining its broad applicability beyond wild animal contexts: “what a plaintiff may challenge under the Fifth Amendment is what the government has done, not what third parties have done.”¹⁵⁷ The takings claim arises when the government authorizes a third party to restrict a property owner’s rights, not when the third party actually exercises that ability to restrict the owner’s use.¹⁵⁸ The Supreme Court has endorsed this view, albeit in the context of regulatory takings.¹⁵⁹ Other circuits have endorsed it in the context of facial challenges to statutes alleging they constitute physical takings.¹⁶⁰ As soon as the law makes it clear which properties an alleged taking applies to, a cause of action accrues, even though no one has yet interfered with the owner’s use and enjoyment of their property.¹⁶¹

There are some exceptions that arise when a physical taking occurs via a gradual process, as with flooding whose extent is not immediately apparent, but courts consider these exceptions inapplicable when the government action at issue is the enactment of a statute or the promulgation of a regulation.¹⁶² Another important exception arises when it is the government itself, rather than a non-governmental actor, that physically invades the plaintiff’s property interest. In those instances there is obvious state action that may trigger a new cause of action under the Takings Clause, even if the government’s physical invasion is authorized by a statute that has long been on the books. This principle explains why the plaintiff’s claims in *Horne v. Department of Agriculture* were not time-barred even though the statute authorizing the seizure of Horne’s raisins was enacted in 1937.¹⁶³

These are easy cases as a matter of black letter law, and *Cedar Point* does not change their accrual analysis. Prior to *Cedar Point*, however, it was far more difficult to determine the moment of accrual for invasions that fell short of a permanent physical occupation (as it was then understood). These invasions were subject to a fact-specific balancing framework specific to the property owner, so accrual too required that fact-specific balancing. The cause of action arose when a temporary invasion became bad enough to violate the Takings Clause under *Penn Central*’s subjective balancing test.

¹⁵⁷ *Navajo Nation v. United States*, 631 F.3d 1268, 1274 (Fed. Cir. 2011).

¹⁵⁸ *Id.* at 1275.

¹⁵⁹ See *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997), *overruled on other grounds by Knick v. Township of Scott*, 139 S. Ct. 2162 (2019).

¹⁶⁰ See, e.g., *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516 (6th Cir. 1997); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993).

¹⁶¹ *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1163-65 (4th Cir. 1991) (taking claim accrued when ordinance was enacted, not when amortization period required by the ordinance ended).

¹⁶² See *Etchegoinberry v. United States*, 114 Fed. Cl. 437, 475, 483 (2013).

¹⁶³ 576 U.S. 350 (2015).

Consider avigation easements. In *United States v. Causby*,¹⁶⁴ the Supreme Court held that flights over private land work a taking where “they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.”¹⁶⁵ Unlike the cases above, then, a takings claim for an avigation easement did not accrue immediately, not when the government first built the airport or even when the first plane flew over the property owner’s land.¹⁶⁶ Rather, because a taking occurred only if the planes were “so low and so frequent” as to substantially interfere with enjoyment and use of the land, the property owner had to wait to bring the claim.

As the Court of Claims explained after *Causby*, there was “unfortunately, no simple litmus test for discovering” this moment of accrual.¹⁶⁷ Because, under *Causby*, “[s]ome annoyance [had to be] borne without compensation,” the court had to weigh a host of factors to determine when (and whether) the taking occurred: “the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life.”¹⁶⁸ For instance, the Federal Circuit once analyzed the change in decibel levels following the switch from the A-6 aircraft to the EA-6B aircraft to determine the moment of accrual.¹⁶⁹ Not all lower courts weighed the same factors.¹⁷⁰ Yet, the Court of Claims’ statement reflects the difficulty in determining the moment an avigation easement had been taken—and thus the moment the clock begins to run—when a taking is defined by a fact-specific balancing test.

As another example, take the regulation in *Cedar Point*. Prior to the Court’s decision, to determine when—and whether—the access regulation took Cedar Point Nursery’s land would require the court to assess at what point the economic impact of the regulation, its interference with distinct, investment-backed expectations, and its “character” rose to the level of a taking.¹⁷¹ The court might look to how often union organizers actually enter the land and for how long, whether they interfered with the farm’s operations enough to create an easement,¹⁷² whether the

¹⁶⁴ 328 U.S. 256 (1946).

¹⁶⁵ *Id.* at 266.

¹⁶⁶ *See, e.g., Johnson v. Greeneville*, 435 S.W.2d 476, 481 (1968) (holding claim did not accrue when property owners first learned airport was to be built in the neighborhood).

¹⁶⁷ *Jensen v. United States*, 305 F.2d 444, 447 (Ct. Cl. 1962).

¹⁶⁸ *Id.* at 477.

¹⁶⁹ *See Argent v. United States*, 124 F.3d 1277, 1286 (Fed. Cir. 1997).

¹⁷⁰ For a discussion of the varying approaches to determining the moment of accrual for an avigation easement, *see* 6A MATHEW BENDER, NICHOLS ON EMINENT DOMAIN § 36.08 (3d. ed 2022).

¹⁷¹ *See Penn Central*, 438 U.S. at 124.

¹⁷² *See Cedar Point Nursery v. Shiroma*, 956 F.3d 1162, 1165-66 (9th Cir. 2020) (Ikuta, J., dissenting from the denial of rehearing en banc) (“The union organizers disrupted work by moving through the trim sheds with bullhorns, distracting and intimidating the workers.”).

property owners had discrete investments, and so on. Given the need for this fact-specific balancing, a property owner could likely bring a claim long after the access regulation was first enacted. A reasonably diligent owner who argued that the legal line was crossed at this point rather than that point would likely get the benefit of the doubt from a court, particularly in the absence of hard-and-fast evidence about the relevant timeline and intensity of uses.

Following *Cedar Point*, this analysis changes. As in *Nollan* and *Fallini*, the access regulation itself is a per se physical taking. As such, the claim accrues immediately, even before any union organizers actually enter the land. In the case of *Cedar Point*, this means the claim accrued as early as 1975 for property owners whose land was already subject to the regulation. Certainly by 1976, when the California Supreme Court decided that the regulation was neither a taking nor a trespass, the clock to sue in federal court started running. Note that the Ninth Circuit, where *Cedar Point* was litigated, has embraced a rule that mirrors *Fallini*'s.¹⁷³ One virtue of *Cedar Point* is replacing the indeterminate *Penn Central* accrual analysis with a bright line rule that is easy to administer much of the time.

Because of equitable tolling and disabilities that may excuse a particular landowner's failure to sue right away (say a minor or someone who is incarcerated),¹⁷⁴ there will be a temporal gap between the statute of limitations period and the date at which a government regulation is categorically "in the clear." The Supreme Court has held that a "regulation or common-law rule cannot be a background principle for some owners, but not for others."¹⁷⁵ Thus, the fact that a particular landowner is time-barred from bringing a Takings Claim does not itself transform the regulation or statute they would have wanted to challenge as a background principle of state property law. As a rough approximation, a statute or regulation authorizing third-party entry may be definitively immune from takings suits roughly twenty years after the statute of limitations would ordinarily run because at that point an infant owner would have reached the age of majority. This span of two decades plus the statute of limitations period provides a temporal limitation that isn't far off from many judges' intuitions about how old a restriction on the use of land must be to qualify as a background principle.¹⁷⁶

B. The Continued Relevance of Balancing

Cedar Point only changes the accrual analysis when a law explicitly grants a right of access. When the government enters onto private land in a more ad hoc way, *Cedar Point* might still require fact-specific balancing to determine whether the Takings Clause or the law of trespass is the proper framework. Assuming the former, courts may also need to engage in fact-specific balancing to determine when the taking occurred.

For instance, prior to *Cedar Point*, courts did sometimes treat intermittent government entry as a physical taking, rather than a regulatory taking, but only when the "physical

¹⁷³ See *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1087 (9th Cir. 1991).

¹⁷⁴ See *DUKEMINIER ET AL.*, *supra* note 8, at 106.

¹⁷⁵ *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2011).

¹⁷⁶ See *supra* note 116.

intrusion...[rose] to the extreme level of a ‘permanent’ physical occupation.”¹⁷⁷ In *Otay Mesa Properties v. United States*, for instance, the plaintiff argued that the Border Patrol’s activities on its land worked a per se physical taking. To determine when the taking occurred—and thus when the claim accrued—the court had to conduct a “highly fact-specific” inquiry.”¹⁷⁸

For a period, the Border Patrol’s presence on the land “was sporadic and transient at best, and neither party argue[d] that a physical taking occurred at that time.”¹⁷⁹ By the mid-to-late 1990s, however, the Border Patrol’s presence “grew from sporadic to pervasive.”¹⁸⁰ To determine whether this intrusion rose to the level of a “permanent physical occupation,” the court considered the increases in manpower, the vehicle fleet, the helicopter fleet, the number of seismic sensors deployed, the amount of permanent lighting, the amount of portable lighting, the number of infrared night-vision goggles, and the grading of the plaintiff’s roads.¹⁸¹ In all, the court held, “If the Border Patrol’s activity on Plaintiffs’ property ever arose to a ‘permanent and exclusive occupation,’ it did so between 1996 and 1999.”¹⁸² Because plaintiffs brought their claims in 2006—more than six years after the taking occurred—the court concluded that most of the claims were barred by the statute of limitations.¹⁸³

Under *Cedar Point*, this fact-specific analysis is still required, though under a different name. As the *Cedar Point* Court explained, “Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right.”¹⁸⁴ In distinguishing between the two, courts can look to “the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue.”¹⁸⁵ While a one-time and quick invasion would be a trespass, several such invasions presumably would trigger *Cedar Point*’s per se rule. Before *Cedar Point* the boundary between permanent occupations and temporary invasions demarcated the domain of per se takings that accrued immediately and potential takings that might accrue if they crossed an intensity threshold. Now the relevant boundary is between temporary invasions and trespasses. Developing rules of thumb to delineate this boundary may be straightforward. A rule specifying no more than x entries of y duration over z timeframe, perhaps with a sliding scale, would bring clarity and consistency to the doctrine.

¹⁷⁷ *Otay Mesa Prop. L.P. v. United States*, 86 Fed. Cl. 774, 786 (2009), *aff’d*, 670 F.3d 1358 (Fed. Cir. 2012).

¹⁷⁸ *Id.* at 786.

¹⁷⁹ *Id.* at 787.

¹⁸⁰ *Id.* at 787.

¹⁸¹ *Id.* at 787.

¹⁸² *Id.* at 788.

¹⁸³ *Id.* at 776.

¹⁸⁴ *Id.* at 2078.

¹⁸⁵ *Id.* at 2078.

C. Effects of Early Accrual

As explained in Part II.A, *Cedar Point* means that many takings claims related to access regulations should accrue immediately upon the enactment of the statute or regulation to be challenged. The effects of this early accrual are significant, especially at the federal level. Takings claims are brought through two vehicles: federal government takings claims are brought under the Tucker Act, and state claims are often brought under 42 U.S.C. § 1983. The Tucker Act has a six-year statute of limitations.¹⁸⁶ This statute of limitations sets forth a strict jurisdictional bar to the consideration of cases after the period has ended, and as such, courts have an obligation to consider the statute of limitations *sua sponte* even if the parties do not raise the issue.¹⁸⁷ For state claims, § 1983 itself does not specify a statute of limitations, so courts apply the state's statute of limitations for general personal-injury torts.¹⁸⁸ This period is often short: in California, for instance, the statute of limitations is now two years,¹⁸⁹ though it was one year at the time that Cedar Point's cause of action arose.¹⁹⁰ This means that a property owner may only challenge an access regulation within a few years of its enactment.

What about existing laws, like Title VII and the Fair Housing Act, that are now thought to be in jeopardy following *Cedar Point*? Would the statute of limitations for those claims have already run? In a word, yes.

Property owners may try to argue they could not have brought their takings claims prior to *Cedar Point*'s modification of takings per se tests, and so the statute of limitations should be tolled or suspended. But courts are generally skeptical of the idea that statute of limitations should be lengthened retroactively absent unusual circumstances.¹⁹¹ For state claims, property owners may rely on equitable tolling, which “pauses the running of, or ‘tolls,’ a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.”¹⁹² At the federal level, the Tucker Act's statute of limitations is jurisdictional, and thus not subject to equitable tolling.¹⁹³ The Federal Circuit has

¹⁸⁶ 28 U.S.C. § 2501.

¹⁸⁷ *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008).

¹⁸⁸ *Wallace v. Kato*, 549 U.S. 384, 387 (2007).

¹⁸⁹ *Id.* at 388. For state claims, the accrual date of a claim is still a question of federal law

¹⁹⁰ Cal. Civ. Proc. Code § 340(3) (West 1982).

¹⁹¹ *See, e.g., Davis v. Valley Distrib. Co.*, 522 F.2d 827, 830 (9th Cir. 1975).

¹⁹² *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014). The prototypical cases for equitable tolling occur “where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing a filing deadline to pass.” *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990). There is considerable diversity in states' approaches to equitable tolling, and some states do not recognize the doctrine at all. *See, e.g., Riemers v. Omdahl*, 687 N.W.2d 445, 453 (2004) (explaining that North Dakota has never adopted the doctrine of equitable tolling).

¹⁹³ *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008).

nonetheless turned to the “accrual suspension rule” to allow otherwise untimely claims. The rule suspends the accrual of a claim if “the plaintiff shows (1) that the government concealed its acts such that the plaintiff was unaware of their existence; or (2) that the injury was inherently unknowable.”¹⁹⁴ Despite some differences between the two exceptions, Hadley Van Vactor argues the accrual suspension doctrine is “essentially an end run around the prohibition on the equitable tolling doctrine.”¹⁹⁵

In both contexts, courts have suggested that, where a plaintiff did not bring their claim because they relied on “actually binding precedent that is subsequently reversed,”¹⁹⁶ the statute of limitations may be tolled or suspended. In particular, the Court of Federal Claims has allowed otherwise untimely takings claims to proceed based on intervening changes in Supreme Court precedent. In *Horne v. Dep’t of Agriculture*,¹⁹⁷ the Supreme Court held that, when the Department of Agriculture requires raisin growers to physically transfer certain percentages of their raisin crop to the government, there is a “clear physical taking.”¹⁹⁸ In *Ciapessoni v. United States*, a raisin grower brought a putative class action based on the taking of reserve raisins from 2002 to 2009.¹⁹⁹ The United States argued that a portion of the claims were barred by the statute of limitations, but the Court of Federal Claims applied the accrual suspension rule to allow the claims to proceed.²⁰⁰

The Court of Federal Claims noted that it had previously held the same reserve raisin requirement was not a taking.²⁰¹ The court accepted the plaintiffs’ argument that, “while they understood that a taking had occurred when the Committee designated a portion of their raisins as reserve raisins, [the court’s precedent] barred their claims.”²⁰² The court explained, “[T]he law barring their claim [then] changed on June 22, 2015, when the Supreme Court effectively

¹⁹⁴ *Ladd v. United States*, 713 F.3d 648, 653 (Fed. Cir. 2013). Courts have asserted the doctrine is distinct from equitable tolling because it relies on the interpretation of the term “accrue” in the Tucker Act, rather than equitable principles. *See, e.g., Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003).

¹⁹⁵ Hadley Van Vactor, *Shifting Sands of Claim Accrual: John R. Sand & Gravel, Equitable Tolling, and the Suspension of Accrual in Tucker Act Cases*, 62 HOW. L.J. 441, 470 (2019).

¹⁹⁶ *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 258 (2016) (emphasis removed).

¹⁹⁷ 576 U.S. 350 (2015).

¹⁹⁸ *Id.* at 361.

¹⁹⁹ *Ciapessoni v. United States*, 129 Fed. Cl. 332, 333 (2016).

²⁰⁰ *Id.* at 335–36.

²⁰¹ *Id.* at 335.

²⁰² *Id.* at 335.

overturned [the lower court’s past precedent], in holding that the Marketing Order resulted in a physical taking.”²⁰³

It is unlikely that the courts will apply equitable tolling or accrual suspension to takings claims based on established access regulations, like Title VII and the Fair Housing Act. Notably, litigants may have difficulty arguing the existing legal landscape has changed because the Court framed *Cedar Point* as following from its existing precedents, rather than overruling them.²⁰⁴ And, unlike in *Ciapessoni*, where all takings claims were explicitly barred by past precedent, litigants could always challenge access regulations as *Penn Central* takings prior to *Cedar Point*. It is probably dispositive, in our view, that the plaintiffs could have challenged the California regulation under *Penn Central* between 1975 and 2021. Even setting that *Penn Central* point aside, it is unlikely that the plaintiffs would have been able to prevail under the three factors that courts in California use to determine whether equitable tolling is appropriate: (1) timely notice of the claim to defendants, (2) lack of prejudice to defendants, and (3) good faith conduct on behalf of the plaintiff.²⁰⁵ Decades passed after the California Supreme Court upheld the regulation, and before anyone in state government got wind of a potential suit from Cedar Point Nursery and Fowler Packing, and the government is on the same footing with respect to equitable tolling as any private party.²⁰⁶

The continuing violations doctrine could provide a final basis for defeating statute of limitations defenses. Under the continuing violations doctrine a plaintiff might be able to bring an otherwise time-barred claim when the defendant’s conduct is part of a continuing practice if the most recent act by the defendant falls within the statute of limitations period.²⁰⁷ The continuing violations doctrine is only applicable when the defendant has engaged in continuing unlawful acts, not merely when there are persisting adverse effects that result from the defendant’s original violation.²⁰⁸ As a result of recent Supreme Court decisions, most notably *National Railroad Passenger Corp. v. Morgan*,²⁰⁹ “little remains of the continuing violations

²⁰³ *Id.* at 335.

²⁰⁴ *See, e.g., Cedar Point*, 141 S. Ct. at 2074 (“The regulation appropriates a right to physically invade the growers’ property—to literally ‘take access,’ as the regulation provides. It is therefore a per se physical taking under our precedents.”) (citations omitted) (quoting 8 Cal. Code Reg. § 20900(e)(1)(C)).

²⁰⁵ *See McDonald v. Antelope Valley Community College Dist.*, 194 P.3d 1026, 1033 (Cal. 2008).

²⁰⁶ *See id.* at 1034 (“The defendants in *Addison* nevertheless argued equitable tolling should not apply to actions against public entities. We found no basis for any such global exception and rejected the assertion.”).

²⁰⁷ *Bird v. Dept. of Human Servs.*, 935 F.3d 738, 746 (9th Cir. 2019); Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271 (2008).

²⁰⁸ *Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983).

²⁰⁹ 536 U.S. 101 (2002).

doctrine . . . [e]xcept for a limited exception for hostile work environment claims . . .”²¹⁰ *Morgan* held the continuing violations doctrine inapplicable to “discrete acts” that are “easy to identify.”²¹¹ The enactment of a statute and passage of a regulation almost certainly would be characterized as easily identifiable discrete acts, hence the continuing violation doctrine should be inapplicable, and the baseline statute of limitations rules should apply. Recall the Federal Circuit’s repeated insistence that “what a plaintiff may challenge under the Fifth Amendment is what the government has done, not what third parties have done.”²¹² When the government authorizes a third party to enter a property owner’s land, the third party’s actual entry is merely an “adverse effect” of that original taking.

For these reasons the courts have generally been hostile to invocations of the continuing violations doctrine in the Takings Clause context. For example, the First Circuit in *Juarbe-Jimenez* held the doctrine inapplicable to a takings claim brought by an insurer who challenged a Puerto Rico regulation requiring automobile insurers to pay a portion of their profits into a common premium-stabilization fund.²¹³ The plaintiff alleged that the regulation on its face violated the Takings Clause, but the plaintiff did not sue immediately. The court explained that the facial challenge was untimely: a takings claim brought under § 1983 accrues “when the purportedly unconstitutional statute or regulation is enacted or becomes effective . . . because, in such cases, the plaintiff alleges that the mere enactment of a statute constitutes a taking.”²¹⁴ Even though the plaintiff did not know the dollar amount they would lose at the time the regulation was enacted, the court found the continuing violation doctrine “inapposite” to such a Takings Clause theory, noting that the enactment of the rule was “a single harm, measurable and compensable when the statute is passed.”²¹⁵

Clark v. City of Braidwood, a Seventh Circuit case, likewise rejected a plaintiff’s invocation of the continuing violations doctrine after a government authorized a third party to permanently trespass on the plaintiff’s property with an underground pipe.²¹⁶ The pipe remained, and the plaintiff said the continuing trespass meant the government was responsible for a continuing violation, so he could still sue. The court thought otherwise: “Clark alleges one discrete incident of unlawful conduct – the installation of the pipes on his land. That the alleged trespass is, by Clark’s description, ‘permanent’ does not convert that discrete act into one long continuing wrong.”²¹⁷ Similarly, in *Cowell v. Palmer Tp.*, the Third Circuit held that a suit

²¹⁰ *Bird*, 935 F.3d at 748.

²¹¹ 536 U.S. at 114.

²¹² *Navajo Nation v. United States*, 631 F.3d 1268, 1274 (Fed. Cir. 2011) (quoting *Fallini*); *supra* note 157.

²¹³ *Asociacion de Suscripcion Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jimenez*, 659 F.3d 42 (1st Cir. 2011).

²¹⁴ *Id.* at 50 (internal quotation marks omitted).

²¹⁵ *Id.* at 52.

²¹⁶ 318 F.3d 764 (7th Cir. 2003).

²¹⁷ *Id.* at 767.

against a municipality for imposing two liens against private property, which interfered with its development, was time-barred.²¹⁸ The court explained that the “focus of the continuing violations doctrine is on affirmative acts of the defendants. The mere existence of the liens does not amount to a continuing violation. Neither was the Township’s refusal to remove the lien an affirmative act of a continuing violation.”²¹⁹ On this account, the fact that the California regulation gives the state no discretion to deny a union that files the paperwork permission to enter cuts against takings liability for the government.²²⁰ Other circuits to have considered this question agree, with courts emphasizing the government’s interests in finality.²²¹

In short, a close examination of the continuing violations doctrine caselaw reveals it to be a dead end for takings plaintiffs. Where the government simply enacts a statute or promulgates a regulation that applies to the plaintiff’s property and limits the owner’s right to exclude, the time to sue is immediately, not at some later date where the effects of the statute or regulation are more viscerally felt.

D. Zombie Takings Claims?

Cedar Point focuses on preventing a particular kind of government opportunism, such as instances where the government subtly limits an owner’s right to exclude, but proceeds gradually. In those instances, the landowner may not perceive that their rights have been compromised until it is too late to sue for deprivations that ultimately proved consequential. *Cedar Point* prevents this kind of government subterfuge by insisting that each kind of third-party entry the government authorizes provides the owner with a cause of action. There is no need for the owner to wait until the third-party entries become sufficiently grave until they can sue.²²² On our analysis, though, solving that eye-of-the-beholder problem necessarily imposes a reasonable due diligence burden on property owners to find out what rules the government is enacting,²²³ lest they be prejudiced by a temporal gap between the enactment of a limit on property rights and the arrival of third-party entrants on their land. This is a sensible approach to

²¹⁸ 263 F.3d 286, 293 (3d Cir. 2001).

²¹⁹ *Id.*

²²⁰ See *supra* text accompanying note 66.

²²¹ See *Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983); *Kuhnle Bros v. County of Geauga*, 103 F.3d 516, 521 n. 4 (6th Cir. 1997). *Hensley v. City of Columbus* emphasizes that the continuing violations doctrine only applies when the government engages in subsequent affirmative acts that further damage property. Absent such “continual intervention by the state,” there is no continuous violation. 557 F.3d 693, 697 (6th Cir. 2009).

²²² Compare text accompanying *supra* note 162

²²³ For further discussion see *infra* text accompanying notes 287-293.

balancing the desire to constrain government opportunism and the vital social interests in promoting finality and removing uncertainty over the value and ownership of land.²²⁴

There are two important and closely related counterarguments that deserve further attention. A skeptical reader of our argument, or a judge motivated to avoid its implications, might press either of two claims. First, while *Cedar Point Nursery* was time-barred from challenging the California regulation, another owner whose land was re-zoned from commercial or residential to agricultural uses recently (such that a claim would not be barred by the statute of limitations) should still be able to sue. Second, regardless of zoning law, the California regulation does not apply to land until an owner decides to use it to form a business that entails union access rights. Thus, even if the land was zoned agricultural before Cedar Point Nursery owned it, a newly opened business on that land would still be able to revive the claim as soon as it set up shop. To be clear, under both of these counterarguments, Cedar Point Nursery's claims should have still been time-barred, but other plaintiffs would be well-situated to challenge the regulation as a taking.

There is language in *Palazzolo*, discussed more in Part III, that provides proponents of either argument with a leg to stand on. *Palazzolo* is a challenging case in some respects, and there is no mention in any of the opinions of the statute of limitations as a relevant consideration. While re-affirming the “well settled” rule that physical takings have to be brought by the party that owned the property at the time the government authorized the physical invasion,²²⁵ the majority insisted that this rule should not be imported into regulatory takings doctrine: “The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic.”²²⁶ But the Court's analysis in this passage is largely based on two factors – the purely regulatory nature of the alleged taking in *Palazzolo* and the uncertainty surrounding when a plaintiff can establish ripeness under the then applicable rule of *Williamson County* (which required that a plaintiff seek compensation in state proceedings and exhaust all appeals before initiating a federal suit for takings).²²⁷ The Supreme Court in *Cedar Point* limited its holding to physical invasions; the decision is inapplicable to regulations that do not provide for invasions of property.²²⁸ And the Supreme Court in *Knick* abrogated *Williamson County*, making it much easier for plaintiffs to sue in federal court over takings.²²⁹ As a result, much of the rationale for

²²⁴ Compare *Gabelli v. S.E.C.*, 568 U.S. 442, 448-49 (2013) (“Statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. They provide security and stability to human affairs. We have deemed them vital to the welfare of society and concluded that even wrongdoers are entitled to assume that their sins may be forgotten.”) (citations and internal quotation marks omitted).

²²⁵ *Palazzolo*, 533 U.S. at 628 (quoting 2 SACKMAN, EMINENT DOMAIN 5.01[5][d][i]).

²²⁶ *Id.* at 628.

²²⁷ *Id.*

²²⁸ *Cedar Point*, 141 S. Ct. at 2076-77.

²²⁹ *Knick v. Township of Scott*, 139 S. Ct. 2162, 2177 (2021).

Palazzolo's suggestion that the state cannot "put an expiration date on the Takings Clause" has evaporated.

In our view a zoning change probably should not revive a long-expired cause of action. Suppose the following facts. A 1950 law requires dairy farmers to submit to annual inspections by yogurt producers. The statute of limitations to challenge the law has long since expired. Now, in 2022, a property owner successfully re-zones residential land to permit agricultural uses and sues to challenge the 1950 law as applied to him. He says no one could have sued over the application of that law to that parcel of land because at that point it didn't apply. Alternatively, imagine that the land was used to grow wheat before 2022, when a new owner decides to convert it to dairy production for the first time.

Permitting the cause of action to go forward in a world of re-zoning or a newly formed business marginalizes statutes of limitations in the Takings Clause context, depriving the government of the possibility of finality and endangering decades of settled expectations that have informed investments in property. The reliance interests against permitting such zombie takings claims to emerge seem strong. For these reasons courts generally regard as "untenable" efforts to revive causes of action based on changes in ownership or land use.²³⁰ Beyond that, such re-zones to permit new uses of land typically occur at the request of the landowner. So a landowner who asks the government to re-zone the land necessarily is requesting that land not presently subject to a regulation now be subject to a regulation, and then sues the government because the newly applicable regulation constitutes a taking. That seems like the definition of *chutzpah*,²³¹ and if governments can become liable under the Takings Clause for granting such landowner requests then they may respond by refusing to re-zone property more generally. That outcome would diminish everyone's welfare.

Economic arguments provide a further rationale for rejecting zombie takings claims. The injury that the Takings Clause is concerned with is a diminution in property values. Hence the Constitution's focus on "just compensation" as the remedy for takings. When a new restriction on the use of land is enacted, it immediately lowers the value of property.²³² Real estate values are based on the highest and best permitted use of land, not merely their current uses, and if there is any probability of a re-zone that enables a shift away from land's current use, that potential change should drive up the value of land. By affecting the economic value of the highest and best use of property, newly enacted restrictions thus have immediate impacts on land values. In other words, suppose that a parcel is currently zoned agricultural but a re-zone of the land to more profitable residential uses is plausible. Now suppose that the legislature enacts a new law authorizing third parties to enter residential property. That law should affect the value of land that is already zoned residential and land that foreseeably might be re-zoned to permit

²³⁰ *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1087 (9th Cir. 1991) (rejecting as untenable a landowner's argument that a new takings cause of action to challenge a rent control ordinance arises "each time the appellants' tenants sell a mobile home to a new tenant and appellants are precluded from raising rent")

²³¹ The behavior is analogous in some ways to "coming to the nuisance." See Restatement (Second) of Torts § 840D (1979).

²³² See *infra* text accompanying notes 261-265.

residential uses. Thus a re-zone that occurs long after a statute or regulation restricts property rights should not breathe new life into an otherwise time-barred takings claim.²³³

Formalist and structural arguments further strengthen the idea that some regulations and statutes are too old to be challenged as takings. Consider the fact that the federal government and state governments generally can acquire private property via adverse possession.²³⁴ More than one court has held that it would be incongruous for the law to treat government invasions of property that persisted for long enough to satisfy the adverse possession requirements as takings claims that could be brought after the adverse possession statute of limitations expired.²³⁵ Both adverse possession by the government and statute of limitations more generally serve the same deep structural interest in property law – the importance of finality in determinations about who owns what and the scope of the government’s authority. The ability of the government to obtain land via adverse possession all by itself shows that the Takings Clause can have an expiration date, at least where physical takings claims are concerned.

All that said, there is a sensible compromise position available to readers who aren’t persuaded by our analysis of zombie takings claims. Under that compromise approach someone bringing a zombie takings claim that is timely only because of a re-zone to property ought to be able to recover damages. But that owner, who can sue because the taking previously did not affect the value of her land, ought not to be able to bring a facial challenge against the taking, nor should they obtain injunctive relief on behalf of a large number of property owners whose own claims would be time-barred. If zombie takings claims are circumscribed in that way, then the compromise approach still provides government with the benefits of finality and predictability, capping any liability that could occur decades after the enactment of a problematic statute or regulation. While we do not endorse that compromise position here, it may be attractive to readers that recognize the value in enforcing statutes of limitations but feel especially sympathetic to property rights claims brought by owners who did not realize at the time that a restriction on the use of property would diminish their rights.

III. The Effect of a Post-Taking Transfer of Property

Part II suggests that Cedar Point Nursery and Fowler Packing’s takings claim accrued in 1975, when the access regulation was enacted. That assumes Cedar Point Nursery and Fowler Packing actually owned land subject to the regulation at that point. If they purchased the land later, however, their claims could be barred by a different rule. Where a purchaser acquires property after a regulatory taking, they may challenge that taking. Where a purchaser acquires property after a *physical* taking, however, the claim for compensation does not pass to them; it remains with the original owner.

²³³ For further discussion see *infra* text accompanying note 266.

²³⁴ See, e.g., *Stanley v. Schwalby*, 147 U.S. 508, 519 (1893); *Roche v. Town of Fairfield*, 442 A.2d 911, 916-17 (Conn. 1982); *State ex rel. A.A.A. Investments v. City of Columbus*, 478 N.E.2d 773, 775 (Ohio 1985).

²³⁵ *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 94-96 (1st Cir. 2003); *State ex rel. A.A.A. Investments*, 478 N.E.2d at 775.

This distinction between regulatory and physical takings for post-taking purchasers is somewhat under-theorized, but both the Court and scholars have assumed it holds true.²³⁶ The distinction originated in *Palazzolo v. Rhode Island*.²³⁷ There, Palazzolo alleged that the application of a state wetlands regulation to his property worked a taking because (1) it prohibited all development of the land, thus depriving him of all economic use under *Lucas*; and (2) it was a regulatory taking under *Penn Central*.²³⁸ This seems like a straightforward takings claim, except that title to the property had passed to Palazzolo after the regulation went into effect.²³⁹

The court below, the Rhode Island Supreme Court, held that “Palazzolo’s post-regulation acquisition of title was fatal” to both his claims.²⁴⁰ In rejecting his *Lucas* claim, the Rhode Island Supreme Court found that, because Palazzolo acquired the land after the enactment of the regulation, it constituted a “background principle of state law,” and therefore could not be a taking.²⁴¹ On the *Penn Central* claim, the Rhode Island Supreme Court held that, because Palazzolo was on notice of the regulation, it could not interfere with his reasonable investment-backed expectations.²⁴² Together, “the two holdings together amount to a single, sweeping, rule: A purchase or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.”²⁴³

The Court rejected this rule in the regulatory takings context because it “put an expiration date on the Takings Clause.”²⁴⁴ The Court explained, “Were we to accept the State’s rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. . . . Future generations, too, have a right to challenge unreasonable limitations on the use and value of the land.”²⁴⁵ The Court worried that, under the state’s rule, a takings claim could not be asserted where an owner attempted to challenge a regulation but could not “survive the process of ripening his or her claim” before transferring the property.²⁴⁶ It “would work a critical alteration to the nature of

²³⁶ See, e.g., *Palazzolo*, 533 U.S. at 628; Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533, 576 (2002); Gregory M. Stein, *The Modest Impact of Palazzolo v. Rhode Island*, 36 VT. L. REV. 675, 688–89 (2012).

²³⁷ 533 U.S. 606 (2001).

²³⁸ *Id.* at 616.

²³⁹ *Id.* at 616.

²⁴⁰ *Id.* at 626.

²⁴¹ *Id.* at 629.

²⁴² *Id.* at 616.

²⁴³ *Id.* at 626.

²⁴⁴ *Id.* at 627. The Court did not acknowledge that the statute of limitations is itself an expiration date on the Takings Clause.

²⁴⁵ *Id.* at 626.

²⁴⁶ *Id.* at 627.

property” if the landowner could not transfer their full interest in the property—including the inchoate takings claim—to a new party.²⁴⁷ Palazzolo’s claim only became ripe after he acquired title and his applications for development were rejected. “A blanket rule that purchasers with notice have no compensation right *when a claim becomes ripe* is too blunt an instrument to accord with the duty to compensate for what is taken.”²⁴⁸ Such a rule would allow the state to “secure a windfall for itself.”²⁴⁹ Though the Court did not say as much, it is possible to read the Court’s rule as limited to those cases where the claim became ripe only after the property was acquired; if a regulatory takings claim was ripe prior to the acquisition of title, it could still be barred.²⁵⁰ Moreover, the Court noted that the timing of the regulation being challenged and the plaintiff’s acquisition of the affected land were relevant to the takings analysis. They just couldn’t be dispositive.²⁵¹

Consistent with this emphasis on ripeness, the Court very clearly distinguished one situation where “[f]uture generations” do *not* have a right to challenge state action: physical takings. Challenges to land-use regulation do not “mature until ripeness requirements have been satisfied.”²⁵² In contrast, physical takings ripen immediately: “In a direct condemnation action, or when a State has physically invaded the property without filing suit, the fact and extent of the taking are known.”²⁵³ As such, the “general rule [for physical takings]. . . [is] that any award goes to the owner at the time of the taking, and . . . the right to compensation is not passed to a subsequent purchaser.”²⁵⁴

²⁴⁷ *Id.* at 627.

²⁴⁸ *Id.* at 628 (emphasis added).

²⁴⁹ *Id.* at 627.

²⁵⁰ See Stein, *supra* note 236, at 691–92.

²⁵¹ See *Palazzolo*, 533 U.S. at 632, 633 (O’Connor, J., concurring) (“Today’s holding does not mean that the timing of the regulation’s enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance.”).

²⁵² *Palazzolo*, 533 U.S. at 628.

²⁵³ *Id.* at 628. There is one potential caveat here: *Palazzolo* stated that its physical takings rule applies where the government “physically invade[s] the property without filing suit.” See *id.* This could be read to suggest that only an actual physical invasion—and not just a grant of authorization from the government—triggers the rule. One might argue that, where no one has “physically invaded” the property, the subsequent purchaser should be able to challenge the taking. This approach would run contrary to Court’s general approach to easements, discussed in Part II.A.

²⁵⁴ *Id.* at 628 (citing *Danforth v. United States*, 308 U.S. 271 (1939)). Though the Court’s reference to a “general rule” might suggest it is a rule with exceptions, neither *Palazzolo* nor the *Danforth* case on which it relies mention any such exceptions. See *Danforth*, 308 U.S. at 284 (“For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or late date, receives the payment.”). *Danforth* is short on analysis.

Palazzolo thus held that, while a property owner who acquires title after a *regulatory* taking may still challenge that regulation, a property owner who acquires title after a *physical* taking has no analogous right. (The party that owned the land when the physical taking occurred, however, may challenge the regulation after they have already sold the land, assuming a suit is not barred by the statute of limitations.²⁵⁵) Real estate markets would quickly adjust to this clear rule. Potential purchasers interested in buying land from an owner who had suffered a physical taking would understand that the cause of action did not run with the land. They would pay the owner less as a consequence, and the previous owner could decide whether to sue. Applying these lessons to *Cedar Point*, if the regulation at issue in *Cedar Point* constituted a physical taking, then “any award [should go] to the owner at the time of the taking, and . . . the right to compensation is not passed to a subsequent purchaser.”²⁵⁶ This is the natural consequence of viewing the access regulation as a physical taking, and not a regulatory taking: the rule prohibiting physical takings claims from passing to subsequent purchasers bars Cedar Point Nursery’s claim.

To summarize, *Cedar Point* was premised on faulty assumptions that the proper plaintiffs had filed their suits in a timely manner. Under well-established law that was left untouched by the *Cedar Point* Court, similarly situated plaintiffs should lose claims they bring. As a matter of legal realism, the Supreme Court could, of course, overrule *Palazzolo*, reject *Fallini* and the many cases that follow it, and upend two separate bodies of law that have been uncontroversial for decades. As we have seen in recent terms, Supreme Court precedents are binding up until the moment when five justices decide they are not.²⁵⁷ Indeed, *Cedar Point* ignores the Constitution’s text and original public meaning,²⁵⁸ so some of the guard-rails that could constraint results-oriented judging are absent in the Takings Clause context. Yet the *Cedar Point* majority felt constrained to at least pretend that its decision was consistent with earlier precedents, and if the Court did gut statutes of limitations defenses in takings suits there could be spillovers to civil

²⁵⁵ Cf. Stein, *supra* note 145, at 105.

²⁵⁶ *Palazzolo*, 533 U.S. at 628.

²⁵⁷ See, e.g., *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade* and *Casey v. Planned Parenthood*); *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (overruling *Apodaca v. Oregon* and *Johnson v. Louisiana*); *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) (overruling *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*); *Franchise Tax Bd. Of California v. Hyatt*, 139 S. Ct. 1485 (2019) (overruling *Nevada v. Hall*); *Janus v. American Federation of State, County, and Mun. Employees*, 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Bd. Of Education*). In other contexts, a majority of the Supreme Court has proven itself willing to disrupt longstanding doctrinal frameworks, probably with an eye towards reaching ideologically congenial results. See *Shelby County v. Holder*, 570 U.S. 529 (2013).

²⁵⁸ On the original meaning of the Takings Clause, see John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

cases where the Supreme Court majority is more sympathetic to defendants. More importantly, the statute-of-limitations and accrual issues are likely to percolate in the lower courts for quite a while before the Supreme Court weighs in, so the current accrual and statute of limitations doctrines could remain well-established for decades, even if the Court does eventually disavow *Fallini* and *Palazzolo*.

Alternatively, the Court could pursue a superficially less extreme tack, holding that although *Cedar Point* treats temporary physical invasions like permanent physical occupations, such that both are per se takings, *Palazzolo* should be understood to treat temporary physical invasions like regulatory takings, so an owner who acquired land after the physical taking cause of action accrued can still sue. To be sure, that effort to distinguish *Palazzolo* would be curious, because the main point of *Palazzolo* is that regulations generally should be subject to balancing tests rather than per se rules, and *Cedar Point* tells us that in the domain of physical invasions per se rules apply exclusively. For that reason, simply rejecting the Federal Circuit's *Fallini* line of authority is probably the path of least resistance for a Supreme Court interested in using *Cedar Point* as an "opening salvo in a war against the regulatory state."²⁵⁹

Yet there is reason to think that the Supreme Court's present conservative majority does not have five justices who wish to use the Takings Clause to gut antidiscrimination law, labor law, environmental law, and the like.²⁶⁰ The legal arguments we identify supply what's missing from *Cedar Point* itself, a coherent limiting principle that renders its holding important rather than revolutionary. *Cedar Point* makes it easier for landowners to win takings claims by shifting cases that previously would have been governed by a balancing test over to a per se test that's far friendlier to landowners. Per se tests simplify the law and remove some otherwise relevant equitable considerations from the calculus. It has long been the case that if landowners wished to benefit from these per se tests they could not sleep on their rights. They had to sue promptly in response to the government action that diminishes their property rights, even when there is a time lag between the creation and exercise of third party entry rights. *Cedar Point* does not and should not change that reality.

Our argument also helps provide content to the Supreme Court's enigmatic *Lucas* test. In our view statutes and regulations become background principles of state property law when statutes of limitations to challenge those laws as takings expire and become immune from challenge even under disabilities and equitable tolling provisions. Under this approach, physical takings challenges to statutes and regulations that have been in place for decades are time-barred, though challenges to newer government rules that permit third parties to enter private property are likely to prevail. Properly understood, *Cedar Point* will grandfather in limitations on property rights that would require compensation if newly enacted today. As a result, *Cedar Point* will constrain governments seeking to develop innovative approaches for managing collective action problems. Yet *Cedar Point* is not going to ring in the new era of libertarian triumphalism that its critics fear and that its champions celebrate.

²⁵⁹ Mahoney, *supra* note 11, at 17.

²⁶⁰ See *supra* note 17, 118-119, and accompanying text.

IV. Why Treat Physical and Regulatory Takings Claims Differently?

There is strong doctrinal support for the notion that the claims in *Cedar Point* were barred by both of the above timing rules. For those concerned about the implications of *Cedar Point*, these timing rules might seem like a good idea because they can save existing laws now at-risk (assuming equitable estoppel, the accrual suspension doctrine, and the continuing violations doctrine do not apply). But these timing rules were established before *Cedar Point* expanded the world of physical takings, and a skeptical reader may wonder if the justifications underlying these rules still make sense. So it is worth grappling with the policy-related justifications for the two timing rules.

A. Normative Justifications for the Cause of Action Accrual Rules

First, consider the question of when a cause of action accrues in circumstances like *Cedar Point*, when a government enacts a statute or regulation that abrogates a landowner's right to exclude certain third parties, years pass, and then the third parties exercise their rights to enter the property, prompting a takings suit by the landowner against the government. Should the law excuse a landowner who waited until the third parties actually showed up before filing a claim against the government?

The answer almost has to be no, for several reasons. First, the enactment of a legal rule that eliminates a property owner's right to exclude has immediate negative effects on the value of the owner's land. Empirical work by Jonathan Klick and Gideon Parchomovsky validates this claim by analyzing the enactment of a "right to roam" law in England and Wales that prohibited landowners from excluding hikers from certain private property.²⁶¹ Because roaming rights did not arise on all private property, Klick and Parchomovsky were able to identify the economic effects on parcels that were more likely to be subject to new third party roaming rights and those that were not.

Critically, for our purposes, Klick and Parchomovsky keyed on the law's enactment date, rather than its subsequent implementation dates, to analyze the real estate price effects of weakening the right to exclude.²⁶² They found an immediate, negative, and statistically significant effect on real estate prices in those areas where the right to roam affected much of the land, compared to those areas where few parcels were affected. On average, the right to roam law's enactment immediately brought about a permanent decline of roughly 5 to 6% in real estate prices in parts of England and Wales where many properties were subject to the law.²⁶³ The authors conclude that the data reveals a causal connection between the enactment of the law and the immediate, statistically significant decline in real estate values.²⁶⁴ In short, the

²⁶¹ Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917 (2017).

²⁶² *Id.* at 948.

²⁶³ *Id.* at 952, 956, 958.

²⁶⁴ *Id.* at 960 ("As with England, the results for Wales suggest that the passage of the right to roam statute in 2000 led to substantial declines in real estate prices in those countries and municipal authorities where a relatively large fraction of the land area was designated as access

experience from the United Kingdom suggests that when the government substantially restricts owners' rights to exclude third parties, real estate markets respond swiftly and efficiently. Landowners feel the economic pain as soon as the statute is enacted, not at a later date when the third parties exercise their new rights to enter private property. Other empirical research similarly shows that real estate markets adjust swiftly to the enactment of new laws.²⁶⁵

The efficient responses of real estate markets to new use restrictions differentiates accrual analysis of takings claims from other kinds of constitutional claims. A limit on free speech rights or gun rights may not bite until a person's liberty is infringed. Thus, the government has no statute of limitations defense if a law enacted decades ago is challenged by a plaintiff who was not alive at the time of enactment and against whom it is now being enforced.²⁶⁶ But restrictions on rights to exclude immediately affect property values and alter the owner's bundle of rights even where the owner's current uses are unaffected. The reduction in property values is the precise harm that the Takings Clause's just compensation requirement remedies. Hence statutes of limitations begin to run upon enactment of the rule restricting property rights.

This fundamental economic reality is reflected in Supreme Court doctrine. As the Court recently explained in *Knick v. Township of Scott*, "We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken. . . . And we have explained that the act of taking is the event which gives rise to the claim for compensation. The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner."²⁶⁷ Note that the statute of limitations for takings claim generally starts to run when a cause of action "first accrues."²⁶⁸ *Knick* itself is instructive. The case involved a local government rule that required cemetery owners to keep their land open to the public during daytime business hours, and *Knick* was a rural landowner whose land contained a small graveyard where some of her neighbors' ancestors were buried. She objected to the township's rule, alleging that the ordinance itself constituted a taking of her property.²⁶⁹ The Supreme Court held that she could sue right away, never even entertaining the notion that her claim was not ripe until third parties showed up

land. The fact that most of the change occurred quickly after the passage of the statute enhances our confidence that the identified relationship can be interpreted causally.").

²⁶⁵ See, e.g., Rebecca Diamond, Tim McQuade & Franklin Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 AMER. ECON. REV. 3365 (2019); Anup Malani, *Valuing Laws as Local Amenities*, 121 HARV. L. REV. 1273 (2008).

²⁶⁶ See, e.g., *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (striking down a New York law limiting rights to carry concealed weapons that dated to the early 1900s).

²⁶⁷ 139 S. Ct. 2162, 2170 (2019).

²⁶⁸ The Tucker Act employs this "first accrues" language, which the Supreme Court has regarded as meaningful. See *Franconia Assoc. v. U.S.*, 536 U.S. 129, 144-45 (2002).

²⁶⁹ *Id.* at 2168.

during daytime hours and demanded entry onto her land.²⁷⁰ We can understand *Knick* as a hallmark of the Court's impatience with state court proceedings regarding rights and compensation. If the Court in *Knick* is telling the parties to get on with it, then recognizing that the owner should sue upon the enactment of a statute or regulation authorizing third party entry makes sense.²⁷¹

Second, Klick and Parchomovsky's research sheds light on another important issue pertinent to accrual timing rules. The law often faces a question of whether to promote lawsuits early or late. For example, suppose that workers are exposed to a carcinogenic substance on the job, and everyone faces an elevated risk of developing cancer as a result.²⁷² Should the law let everyone sue right away for the elevated risk? Or should the legal system wait to see who gets cancer and who doesn't, and allow only those who suffer concrete harms of that sort to sue? The general response of the law is to wait and see, rather than permitting compensation for exposure to an elevated risk. Whatever the merits of this approach, it isn't necessary in the context of physical takings. Markets price losses of the right to exclude into property values immediately, so the marginal value of waiting a decade or two to get more information about precisely how heavily third parties are exercising their entry rights will be small. These gains from waiting are likely to be dwarfed by the corresponding benefits of determining how much compensation is due promptly so that owners can receive compensation and sell their land to someone who values it more, and the government can engage in fiscal planning that anticipates expected liabilities. Physical takings, in short, are a domain where it's appropriate to expect owners to sue when a new law restricting the right to exclude is implemented.

Third, a takings suit is brought against *the government*. Once the government enacts a statute or regulation that authorizes third parties to enter private property, the state's work is essentially done. Whether third parties decide to exercise those rights is up to the third parties, not up to the government.²⁷³ This formalist argument was a large part of the basis for the *Fallini*

²⁷⁰ *Id.* at 2172-73.

²⁷¹ An alternative, results-oriented reading of *Knick* cuts against this view. If *Knick* is simply about strengthening the hand of takings plaintiffs at the expense of government defendants, then permitting property owners to sue either right away or upon the third party's entry achieves that *realpolitik* goal.

²⁷² See, e.g., Jamie A. Grodsky, *Genomics and Toxic Torts: Dismantling the Risk-Injury Divide*, 59 STAN. L. REV. 1671 (2007). Similar issues arise in data breach litigation, when we know whose information has been compromised but we do not know who will suffer injuries as a result. See Lisa Yao Liu & Lior Jacob Strahilevitz, *Cash Substitution and Deferred Consumption as Data Breach Harms*, Univ. Chi. Coase-Sandor Instit. for L. & Econ. Research Paper No. 963 (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4187930.

²⁷³ Ironically, in *Cedar Point* itself, the United Farm Workers did not follow the legal process to obtain permission to enter Cedar Point Nursery's land. See *supra* text accompanying note 78. By failing to satisfy the requirements of the regulation being challenged, the union was trespassing. It is hard to come up with a theory for how that trespass is the government's fault. Cedar Point Nursery nonetheless sought injunctive relief based on the plausible fear that the

line of authority discussed above,²⁷⁴ and we think it's an intuitive one. Recall the admonition that "what a plaintiff may challenge under the Fifth Amendment is what the government has done, not what third parties have done."²⁷⁵ To be sure, the government may be called upon at a later date to enforce an existing law or adjudicate a dispute about its meaning. Perhaps a landowner prohibits the third party from entering the premises, contrary to the statute or regulation, as was the case with *Fowler Packing*.²⁷⁶ But those kinds of measures to enforce or clarify a long-ago enacted statute that already reduced the owner's property values cannot reset the statute of limitations period without rendering the statute of limitations meaningless as a government defense. Absent more active government involvement, such as the government's repudiation of a promised contract right,²⁷⁷ or the entry onto land by government agents (as opposed to non-governmental third parties),²⁷⁸ it is the enactment of the statute or regulation that starts the clock running. When the government triggers the Takings Clause by authorizing a third party's entry, whether a third party ever shows up to exercise a right to enter the premises affects only the question of damages, not government liability.²⁷⁹

Finally, in many instances where a government authorizes third parties to invade private property, and then at a later date a third party does enter the property at issue, it is often the owner, rather than the government, whose actions influenced the probability of a third party entry. *Cedar Point Nursery* is instructive in that respect. Unions are resource-constrained; they do not target workplaces at random. Rather, they identify workplaces where they are relatively likely to succeed and where the benefits of successful unionization will be particularly high.²⁸⁰ These metrics are in turn influenced by choices that employers make about pay, benefits, job security, the perceived fairness of grievance and disciplinary procedures, and the treatment of

union would properly follow the regulation and seek to enter their property in the future. See *Cedar Point Nursery v. Gould*, 2016 WL 1559271, at *1-*2 (Apr. 18, 2016).

²⁷⁴ See *supra* notes 148-173.

²⁷⁵ *Navajo Nation v. United States*, 631 F.3d 1268, 1274 (Fed. Cir. 2011); text accompanying *supra* note 157.

²⁷⁶ See *Cedar Point Nursery v. Shiroma*, 956 F.3d 1162, 1166 (9th Cir. 2020) (Ikuta, J., dissenting from the denial of rehearing en banc).

²⁷⁷ See *Franconia Assoc.*, 536 U.S. at 148.

²⁷⁸ See *Goodrich v. U.S.*, 434 F.3d 1329, 1334 (Fed. Cir. 2006) (describing the decisive distinction between government agents, who act at the state's behest, and government "permittees," who may themselves decide to enter onto private property with government authorization but are not subject to government control).

²⁷⁹ See *Ladd v. U.S.*, 630 F.3d 1015, 1023-25 (Fed. Cir. 2010).

²⁸⁰ Cf. Thomas F. Reed, *Do Union Organizers Matter? Individual Differences, Campaign Practices, and Representation Election Outcomes*, 43 INDUS. LAB. REL. REV. 103, 106-07 (1989) (describing the Machiavellian attributes of successful union organizers).

workers.²⁸¹ Though the federal government may exercise some influence over unionization via the National Labor Relations Board, the typical state or local government entity plays essentially no role in determining whether union organizers will target a particular property owner. In that sense, the property owner, rather than the governmental defendant, is the least cost avoider of eventual third-party entries. Indeed, Fowler Packing, one of the plaintiffs in *Cedar Point*, had a rather checkered history as an employer, having been involved in various disputes with employees over the years involving its failure to pay minimum wage, to log worker hours accurately, to pay workers what they were owed by contract, and to provide the rest periods required by law.²⁸² When an employer engages in these kinds of practices, it materially increases the risk that labor organizers will target the company for a unionization campaign.

This analytical move is applicable beyond labor unions to other kinds of third-party entrants including hunters (who in many states are permitted to enter private property),²⁸³ housing discrimination “testers” sent by governments or civil rights organizations,²⁸⁴ undercover journalists,²⁸⁵ lawyers,²⁸⁶ health care professionals,²⁸⁷ and various other sorts of third parties who may seek to enter private property pursuant to a government rule or license. In each of these instances the actions of a property owner will meaningfully affect the likelihood that a third party right to enter will be exercised. In other contexts, though, such as those involving habitat for protected species or avigation easements, the decisions of third parties to enter will be driven largely by extrinsic considerations outside the control of the landowner plaintiff.

One good response to these rather compelling arguments is that a property owner is more likely to notice the physical entry of a third party onto their property than the government’s enactment of a statute or promulgation of a regulation. We think that argument is probably

²⁸¹ See Steven L. Blader, *What Leads Organizational Members to Collectivize? Injustice and Identification as Precursors of Union Certification*, 18 ORG. SCI. 108, 122-23 (2007); Herbert G. Heneman III & Marcus H. Sandver, *Predicting the Outcome of Union Certification Elections: A Review of the Literature*, 36 INDUS. LAB. REL. REV. 537, 551 (1983); John A. McClendon, Hoyt N. Wheeler & Roger D. Weikle, *The Individual Decision to Unionize*, 23 LABOR STUD. J. 34, 46 (1998).

²⁸² See *Aldapa v. Fowler Packing Co.*, 310 F.R.D. (E.D. Cal. 2015); *Fowler Packing Co. v. Lanier*, 844 F.3d 809 (9th Cir. 2016).

²⁸³ See, e.g., Richard M. Hynes, *Posted: Notice and the Right to Exclude*, 45 ARIZ. ST. L.J. 949 (2013); Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549 (2004).

²⁸⁴ John Obee, *The Importance of Testing Evidence in Housing Discrimination Sales Transactions: Two Case Studies*, 41 URB. LAW. 309 (2009).

²⁸⁵ See, e.g., *Desnick v. ABC*, 44 F.3d 1345 (7th Cir. 1995); *Food Lion, Inc. v. Capital Cities / ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

²⁸⁶ See, e.g., *State v. Shack*, 277 A.2d 369 (N.J. 1971).

²⁸⁷ See, e.g., *id.*

correct as a descriptive matter, but not compelling given the strength of the competing considerations.

The battle over whether ignorance of the law is a defense ended in a rout long ago,²⁸⁸ and in the regulatory takings context there are countless cases where a landowner had a plausible argument that a regulation worked an unconstitutional taking, but the landowner waited too long, and therefore lost the opportunity to receive compensation.²⁸⁹ There is nothing unique about this practice. It is essentially a foundational rule in the American legal system, one backed by the legal system's interest in finality. When there is ambiguity about the meaning of a statute of limitations, the Supreme Court generally adopts "the construction that starts the time limit running when the cause of action accrues."²⁹⁰ And causes of action generally accrue when a reasonably diligent plaintiff would have discovered their cause of action.²⁹¹ In the administrative law context, publication of a rule in the Federal Register provides sufficient notice to affected parties.²⁹² Landowners have constructive notice of laws promulgated at the federal, state, and local level, just as purchasers have constructive notice of properly recorded deeds, even if they did not actually discover those deeds.²⁹³

A second plausible objection stems from the over- or under-compensatory nature of the market's immediate decisions about the value of an infringed right. There may be circumstances where the market responds excessively to a restriction on the owner's right to exclude. For example, maybe real estate prices drop sharply after a new policy is implemented, but over time market forces reflect an understanding that third party rights to enter land will rarely be invoked. Or maybe they will be invoked frequently, but not in a manner that substantially diminishes the owner's enjoyment or use of her property. If excessive market reactions are the norm, rather than the exception, there may be an argument for letting the owner wait and see what the market harm is. By that logic, the cause of action should only accrue when the third parties exercise their rights and owners can provide evidence about the intensity of those third party entries. Ultimately, this objection isn't persuasive, for two reasons. First, as mentioned above, the owner's actions will often influence the frequency and intensity of third parties' entry. Second, and more importantly, the passage of time usually will make it harder to establish a causal connection between the limitation on rights and the effect on real estate prices. The passage of time provides more opportunity for confounding factors (i.e., those not related to the restriction

²⁸⁸ See, e.g., *McFadden v. United States*, 576 U.S. 186, 192 (2015).

²⁸⁹ See, e.g., *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 313 n. 7 (2002); *Gilbert v. City of Cambridge*, 932 F.2d 51, 58-59 (1st Cir. 1991); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993); *Goodrich v. U.S.*, 434 F.3d 1329, 1336 (Fed. Cir. 2006).

²⁹⁰ *Rotkiske v. Klemm*, 140 S. Ct. 355 (2019).

²⁹¹ See *Gabelli v. S.E.C.*, 568 U.S. 442, 452-53 (2013).

²⁹² 5 U.S.C. § 533(b); 36 C.F.R. § 902.21.

²⁹³ Emily Bayer-Pacht, *The Computerization of Land Records: How Advances in Recording Systems Affect the Rationale Behind Some Existing Chain of Title Doctrine*, 32 CARDOZO L. REV. 337, 345 (2010).

on exclusion rights) to influence real estate prices. Thus the danger of overcompensating or undercompensating likely rises over time. While there is no perfect time to decide upon conversation, there is no reason to think that the market's immediate response will systematically overcompensate or undercompensate owners. For that reasons, relying on the kind of immediate market reactions that Klick and Parchomovksy observed, and expecting owners to sue at a time when the effect of a lost property right on property values can be isolated, makes the most sense.

In short, though it might be tempting to say that the abrogation of a right to exclude does not occur until the moment a third party physically invades the owner's land, that conclusion is out of step with both the existing law and widely adopted, broadly applicable rules about cause of action accruals. If they wish to challenge the enactment of a law or the promulgation of a regulation as a per se taking landowners need to sue promptly,²⁹⁴ especially after *Knick*. In short, the *Fallini* rule makes sense for temporary invasions of the sort that occurred in both *Fallini* itself and *Cedar Point*.

B. Why Physical Takings Claims Do Not Run with the Land

This brings us to the second consistent holding in takings law, the idea that while a regulatory takings cause of action gets transferred to the new owner along with the underlying property, a physical takings cause of action can be brought only by the party that owned the land when the cause of action first accrued. The Supreme Court endorsed this principle in *Palazzolo*, so understanding its underpinnings may not be an urgent matter.²⁹⁵ On balance, we aren't convinced that this part of *Palazzolo* is normatively attractive, though there are sensible arguments in both directions.

The distinction between regulatory and physical takings for timing purposes is somewhat under-theorized, but property scholars have offered some plausible justifications for distinguishing between the two. First, as discussed in Part I, it is more difficult to determine when a regulatory taking occurs. Carol N. Brown argues that this ambiguity is one reason to allow subsequent purchasers to pursue regulatory takings claims: The "nature of regulatory takings creates ambiguity as to when a taking has occurred and as to the extent of the regulation's effect on the owner's property."²⁹⁶ Physical takings, in contrast "occur at a discrete point in time and are therefore more readily discernable and identifiable by the involved parties."²⁹⁷ Gregory Stein echoes this justification, noting that physical takings "crystallize at a distinct moment"²⁹⁸ and "the date of the taking is easy to determine."²⁹⁹ These scholars do not explain why this should matter for the transferability analysis, but the argument seems to flow

²⁹⁴ *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687-89 (9th Cir. 1993); *Navajo Nation v. U.S.*, 631 F.3d 1268, 1273-74 (Fed. Cir. 2011).

²⁹⁵ *See supra* text accompanying notes 255-256.

²⁹⁶ Carol Nicole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 24 (2003).

²⁹⁷ *Id.*

²⁹⁸ Stein, *supra* note 236, at 685.

²⁹⁹ *Id.* at 684.

naturally: If there is ambiguity at the time of sale over whether a cause of action has accrued that could chill transactions and prevent a resource from getting to its highest and best user. This argument is no longer true for physical takings after *Knick* (as we read it) and *Cedar Point Nursery*. A physical taking suit against the government always arises when the legal rule authorizing third party entry is enacted. With such a simple, straightforward rule there is no reason to think that welfare-enhancing property transactions would be chilled.

Second, Brown, Stein, and the *Palazzolo* Court further distinguish between physical and regulatory takings based on concerns of ripeness. The effect of a regulation may not be immediately clear and so a regulatory takings claim may not become ripe until after the sale. The *Palazzolo* Court explained it would “illogical[] and unfair” to bar a subsequent purchaser from pursuing a takings claim “where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.”³⁰⁰ In a physical taking case, in contrast, “the fact and extent of the taking” are immediately known.³⁰¹

Once again, a takings claim based on an access regulation should accrue immediately. Under the Court’s existing approach to ripeness, the claims should also ripen at that point.³⁰² For a takings claim to be ripe, “the government entity charged with implementing the regulations [must] reach[] a final decision regarding the application of the regulations to the property at issue.”³⁰³ This final decision informs the takings analysis: the court cannot determine whether, for instance, a zoning ordinance has defeated reasonable, investment-backed expectations without knowing “the extent of permitted development.”³⁰⁴ This final decision requirement “responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer.”³⁰⁵ Where the “unequivocal nature” of the regulation is clear, however, there is no argument that the government will “soften[]” it,³⁰⁶ and the claim is ripe. An open-ended access regulation like that in *Cedar Point* is unequivocal: it grants a right of access in the circumstances delineated by statute. Thus, it should ripen immediately.

One might push back and argue that the “fact and extent” of the taking were not immediately clear when *Cedar Point*’s access regulation was enacted. Would union organizers

³⁰⁰ *Palazzolo*, 533 U.S. at 628.

³⁰¹ *Id.* at 628. *See also* Stein, *supra* note 236, at 684–85; Brown, *supra* note 296, at 24–26.

³⁰² Some scholars have criticized certain Federal Circuit precedents for holding that claims accrue before they are truly ripe. *See, e.g.*, Bridget Tomlinson, *Statutes of Limitations in Rails-to-Trails Act Compensation Claims: The U.S. Court of Appeals for the Federal Circuit Bends the Rules of Takings Law*, 56 CATH. U. L. REV. 1307, 1329 (2007).

³⁰³ *Palazzolo*, 533 U.S. at 618.

³⁰⁴ *Id.* at 618.

³⁰⁵ *Id.* at 620 (quoting *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738, (1997)).

³⁰⁶ *See id.* at 619.

actually take advantage of their right of access? How often? But, the same objections could be raised any time a landowner seeks compensation for an easement.³⁰⁷ Whereas total, physical appropriation of property—for instance, when the government appropriates property to build a highway—may have clear, immediate effects, one could argue that the cost of an easement will always depend on the number of people that access the property at any given time. The Court, however, has never adopted a rule that a takings claim for an easement only ripens when it is used. Indeed, in *Knick* the Court implicitly endorsed the opposite rule.³⁰⁸

Yet there are reasons to think that even a physical takings claim should be able to transfer, regardless of the distinctions above. Some judges and scholars have suggested that, given the cost of pursuing a takings claim, property owners should be able to transfer the claim to a subsequent purchaser.³⁰⁹ For instance, Judge Wesley on the Court of Appeals of New York has suggested that property owners who lack “the resources to commence a taking[s] action” should be able to transfer their property to another party “without destroying the property’s value.”³¹⁰

In his classic article on the alienability of legal claims generally, Michael Abramowicz points to a key justification for legal rules proscribing the buying and selling of causes of action: asymmetric information.³¹¹ The party that suffered a legal wrong will often have better information about the nature of their injury than anyone else would. The resulting adverse selection can chill market transactions. Of course, for the reasons we specified above, a physical takings claim based on the enactment of a legal rule should not produce a substantial information asymmetry – the applicable rules can be determined just as easily by the buyer and seller, and a buyer may actually engage in more due diligence into the law than a current property owner would so as to figure out how much the property is worth. On the other side of the coin, there may be some circumstances in which a buyer would be better positioned to litigate a case (because of expertise or resources, for example) than the party that owned it when the physical taking cause of action accrued.³¹² From this perspective, at least, there does not seem to be a strong justification for treating physical and regulatory takings claims in a categorically different way. But the issue has been settled by the Supreme Court, so unless the Court decides to reverse *Palazzolo*, the issue is of more academic than doctrinal interest.

³⁰⁷ See 6A MATHEW BENDER, NICHOLS ON EMINENT DOMAIN § G32.08 (3d. ed 2022) (discussing the difficulties in the valuation of easements).

³⁰⁸ See *supra* text accompanying notes 269-270.

³⁰⁹ This is not necessarily a reason to distinguish between physical and regulatory takings claims, unless regulatory takings claims are significantly more expensive to litigate.

³¹⁰ *Anello*, 678 N.E.2d at 873. A related argument is that property owners may not have the resources to ripen a takings claim. See Brown, *supra* note 296, at 38–39. Because claims based on access regulations ripen immediately, see Part IV.B, this is not a reason to allow property owners to transfer their takings claims to subsequent purchasers.

³¹¹ Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 743-45 (2005).

³¹² See *id.* at 739-41.

Reviewing the terrain we have covered, then, produces the following insights. The rule that physical takings causes of action accrue when the government authorizes a third party to invade land, not when the third party actually shows up to do so, is firmly embedded in the law. The Supreme Court implicitly recognized as much in *Knick*, and decades of decisions from the Federal Circuit and other federal appellate courts are in accord. The pragmatic justifications for this rule are compelling. By contrast, the rule that physical takings causes of action do not run with the land is firmly established by binding Supreme Court authority in *Palazzolo*. But that part of *Palazzolo*'s holding is much harder to justify in the context of physical takings claims, especially after *Knick* and the lower court precedents made determining when a physical taking cause of action accrues more straightforward. In short, once the courts have embraced a rule providing that physical takings claim accrue upon the enactment of a statute or promulgation of a regulation that restricts the owner's right to exclude, there is no longer a compelling policy justification for restricting the alienability of physical takings claims. If you have one rule you don't need the second. Perhaps the Supreme Court should revisit *Palazzolo*'s belt and suspenders approach.

Conclusion

We already knew that "bad facts make bad law."³¹³ We now see that bad lawyering makes bad law too. Twice in the last three decades lawyers for state governments have waived critical arguments on appeal that likely would have altered the outcomes in litigation. *Lucas* and *Cedar Point* are staples of Property casebooks and landmark Supreme Court decisions, but neither of them ought to be. Had lawyers understood the facts of *Lucas* and the law governing *Cedar Point* better, those land-use disputes would have remained obscure controversies, the stuff of local water cooler discussions rather than grandiose pronouncements from the highest Court in the land. There is a colorable argument that the lawyers for South Carolina and California committed legal malpractice in the two cases.³¹⁴

³¹³ See, e.g., William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 71 n.2 (2011).

³¹⁴ On our analysis, California's lawyers failed to invoke a well-established Supreme Court rule holding that in the case of a physical taking claim the only party that can successfully sue is the party that owned the property when the cause of action arose. Were we defending California's lawyers in such a suit, we would push back in four ways. First, there may be enough ambiguity about when a cause of action accrues in a case where third parties temporarily invade property to suggest that the promulgation of the California regulation did not start the statute of limitations running. Second, *Cedar Point*'s legal theories changed quite a bit between trial and appeal, with the plaintiffs shifting their emphasis from an "easement as per se taking" theory to the idea that the regulation was a per se taking because the regulation had no temporal endpoint. California should have advanced the argument we make above, but the courts let *Cedar Point* get away with making a moving target argument, and that development may have explained why California's lawyers missed such a slam dunk argument against the claim that the Supreme Court ultimately embraced. Third, California's lawyers could defend themselves by saying that the choice not to present an argument in the alternative, but rather to go all in on an argument that the *Penn Central* balancing test applied to the regulation under *Loretto* was defensible, even if hindsight reveals it to have been highly questionable. Finally, California's mistake was

In both cases, the challenge for legal scholars trying to make sense of these landmarks is to pick up the pieces. *Cedar Point* shattered the fragile peace that created a safe harbor for antidiscrimination laws, anti-retaliation laws, rent control laws, and various environmental protections. To challenge these limits on the right to exclude as unconstitutional takings, previous plaintiffs would have to attack the laws under *Penn Central*. And invoking *Penn Central* meant the landowners would lose. Now, it seems, that is no longer the case. Many scholars and lawyers wonder if the contemporary Court will use the Takings Clause to bludgeon what's left of the regulatory state.

In our view the “sky is falling” take on *Cedar Point* misses the mark. Physical takings claims stemming from non-permanent, part-time invasions may be lethal tools in the hands of owners who wish to challenge brand new limits on the right to exclude, like those stemming from eviction moratoria or ban-the-box rules in tenancies. That result is consequential today and will be more consequential still tomorrow. But restrictions on the right to exclude that are of older vintage seem safe, at least if defended by competent counsel for the state and if considered by jurists who care about stare decisis. A panoply of applicable statutes of limitations, cemented by decades of authority from the federal courts, makes it clear that the window to challenge rules such as the Fair Housing Act and anti-retaliation provisions in labor law as physical takings has long since closed. In our view, laws do not become background principles upon enactment. Yet it's entirely workable to say that they become background principles when the statute of limitations to challenge those laws, supplemented by equitable tolling rules or disability provisions that lengthen the timeframe in which plaintiffs can sue, has run. Such a rule would replace a messy and murky body of doctrine with a relatively manageable set of rules. As we see it, even though the Supreme Court was strangely unwilling to recognize decades old union access laws as sacrosanct “background principles of state property law” those laws have achieved that status nonetheless. The consequential battles, going forward, will be over tomorrow's novel restrictions on the right to exclude.

something that various judges, justices, lawyers, and amici all evidently failed to recognize prior to the publication of this article. From a malpractice perspective there is probably safety in numbers. In our final assessment, California's failure to pivot to “even if this is a per se physical taking the plaintiffs' claim is time barred” at any point in their appellate briefs was bone-headed but not quite legal malpractice.