Escape Room: Implicit Takings After Cedar Point Nursery

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Escape Room: Implicit Takings After
Cedar Point Nursery

LEE ANNE FENNELL*

ABSTRACT

In Cedar Point Nursery v. Hassid, the Supreme Court ruled 6-3 that a California regulation that gave union organizers limited access to agricultural worksites amounted to a per se taking. The Court went on to opine that any governmental grant of physical access, no matter how time-limited or functionally constrained, similarly works a per se taking, unless one of the Court’s exceptions applies. This essay argues that Cedar Point is best understood as part of an implicit takings apparatus designed to selectively apply scrutiny to property-facing governmental acts in ways that broadly entrench status quo patterns of property wealth. The Court has effectively constructed an escape room, a gratuitously convoluted analytic environment, that allows it to crack down on disfavored property regulations while giving a free pass to favored ones such as zoning. There is a vulnerability in the Court’s approach, however, if the goal is to knock out unwanted impositions on property owners: the Takings Clause allows the government to simply pay for what it takes. Thus, the Court’s elaborate escape room comes with a lighted exit sign located right above the cash register. And the amounts in question will often be trivial. Thus, for all its exclusion-fetishizing rhetoric, Cedar Point’s bark may prove worse than its bite.

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Escape Room: a game in which participants confined to a room or other enclosed setting (such as a prison cell) are given a set amount of time to find a way to escape (as by discovering hidden clues and solving a series of riddles or puzzles) – Merriam-Webster Dictionary

Table of Contents

INTRODUCTION .......................................................................................... 3

I. TOURING THE ESCAPE ROOM.............................................................. 5
   A. Orientation .................................................................................... 5
      1. The Way Things Were ................................................................. 5
      2. Where We Are Now .................................................................. 11
      3. Two Doors ................................................................................. 13
   B. Physical Takings ............................................................................. 13
      1. The Open Door ......................................................................... 14
      2. Out of Bounds (Trespass) ........................................................ 19
      3. The Constricting Hoops (Exactions) ...................................... 26
      4. The Mystery Flume (Penn Central and Physical Takings) ... 32
   C. Use Restrictions .............................................................................. 37
      1. Out of Bounds, Again (Illegitimate Government Actions) . 37
      2. The “Too Far” Treadmill .......................................................... 38
      3. Avoiding the Void (Total Takings) .......................................... 39
      4. The Uneven Floor (Can Tahoe-Sierra Survive?) ................. 40
      5. The Constricting Hoops, Again (Exactions) ......................... 42
      6. The Balance Beam (Penn Central) ......................................... 44

II. THE SELECTIVE SCRUTINY MACHINE.............................................. 45
   A. Ends and Means ............................................................................ 45
   B. A Functional Remapping ............................................................ 48
      1. Beyond the Pale (Non-Takings Scrutiny) .............................. 48
      2. Background Principles (No Scrutiny) .................................... 49
      3. Penn Central (Low Scrutiny) .................................................. 49
      4. Exactions (High Scrutiny) ....................................................... 50
      5. Per Se Rules (Infinitely High Scrutiny) ................................. 50
      6. Taking Stock .............................................................................. 51
   C. The Cash Register (Just Compensation) ...................................... 54

CONCLUSION ............................................................................................ 60
INTRODUCTION

In Cedar Point Nursery v. Hassid,1 the Supreme Court ruled 6-3 that a California regulation that gave union organizers limited access to agricultural worksites (three hours a day, 120 days a year)2 amounted to a per se taking. The Court further opined that any governmental grant of physical access, no matter how time-limited or functionally constrained, similarly works a per se taking—unless one of the Court’s exceptions applies.3 This essay argues that Cedar Point’s new per se rule and its various ill-defined exceptions are best understood as part of an ongoing campaign by the Court to selectively apply heightened scrutiny in the land use arena in ways that broadly entrench and maintain status quo patterns of property wealth.4 Threats to the status quo can come not only from government-imposed burdens on private property, but also from any weakening of the vast regulatory matrix through which the government protects existing property wealth.5 Managing both threats requires some means of dialing scrutiny of governmental acts up and down at will.6

Cedar Point advances this objective by devising a new per se takings contraption and throwing physical impositions on owners into it wholesale, along with various bewildering means of possible extrication. Implicit takings7 has now effectively become an escape

3. Cedar Point, 141 S.Ct. at 2074–75.
4. For elaboration on this notion of status quo preservation and discussion of its interaction with the aims of the Takings Clause, see infra Part II.A.
6. Notably, this cannot be done by simply beefing up the multi-factor test that the Court articulated in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). See text accompanying notes 27–29, infra (describing this test). The Court cannot make Penn Central significantly more demanding without endangering its own zoning precedents, which are premised on tolerating very large diminutions of value. See, e.g., Euclid v. Ambler Realty, 372 U.S. 365 (1926) (upholding a zoning scheme that diminished the value of some parcels of land by 75%).
7. I use the term “implicit takings” here, following James Krier and Stewart Sterk, to refer to all government acts that constitute takings (for which just compensation must be paid) that do not occur explicitly through the exercise of eminent domain. See James E. Krier & Stewart E. Sterk, An Empirical Study of Implicit Takings, 58 WM. & MARY L. REV. 35, 40–41 (2016); see also infra note 14 and accompanying text (discussing the significance of this terminology).
room—a gratuitously convoluted analytic environment, filled with many traps and puzzles.\(^8\) Using this apparatus, the Court can crack down on disfavored impositions on owners while continuing to give a free pass to favored property regulations like zoning. Although Cedar Point makes little sense as part of an analytically coherent system for assessing when burdens on owners have gone “too far,”\(^9\) it works well as part of a selective scrutiny machine—one designed to preserve restrictions that broadly conserve the established interests of landowners while scrutinizing and financially burdening any property impositions that do otherwise.

There is a vulnerability in the Court’s approach, however, if the true goal is to knock out unwanted impositions on property owners: the Takings Clause allows the government to simply pay for what it takes. Thus, the Court’s elaborate escape room comes with a lighted exit sign, located right above the cash register. And the amounts in question will often be trivial. By my back-of-the-envelope calculations, for example, California might keep its labor access law in place for less than $5 per year per grower.\(^{10}\) Thus, for all its exclusion-fetishizing rhetoric, Cedar Point’s bark may be worse than its bite.

This essay proceeds in two parts. Part I provides a guided tour of the implicit takings escape room as it now stands, along with some guesses as to how unresolved details may be filled in and where things might go next. Here, I take Cedar Point at face value and attempt to trace the logical implications of the decision as written.

Part II reframes Cedar Point as part of a selective scrutiny machine—one that is less concerned with delivering coherent doctrinal guidance than with applying selective pressure and relief to property-facing governmental acts. After examining what purposes this apparatus might serve and how well those goals square with the Takings Clause, I map out its functioning, and then turn to the question of remedies. Throughout, I will focus on real property, leaving aside issues uniquely presented by personal property and intellectual property.

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8. For a similar characterization, see Dan Farber, The Illusions of Takings Law, LEGALPLANET (July 1, 2021), https://legal-planet.org/2021/07/01/the-illusions-of-takings-law/.

9. This formulation is from Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922). See also Lingle v. Chevron, 544 U.S. 528, 539 (2005) “[E]ach of these [takings] tests focuses directly upon the severity of the burden that government imposes upon private property rights.”.

10. See text accompanying notes 215–216, infra.
I. TOURING THE ESCAPE ROOM

Let’s start our tour at the information desk with a short briefing about how we got here, and some provisional maps to guide our way. We will then turn to the various features of the implicit takings escape room itself.

A. Orientation

The Fifth Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, ends with the Takings Clause: “nor shall private property be taken for public use without just compensation.” This clause most obviously places limits on the government’s eminent domain power by requiring that it be exercised for public use and that just compensation be paid. But for the past century, the clause has also been read to require compensation for governmental acts that, although they are not explicit exercises of eminent domain, nonetheless burden property in ways that are deemed to be functionally equivalent. When government, although acting in a legitimate capacity, goes “too far” in imposing on property rights, it must “pay[] for the change.” These compensable impositions were historically termed “regulatory takings,” but are now more clearly and neutrally described by the term “implicit takings.”

1. The Way Things Were

The field of implicit takings has long been described as muddled. Yet its basic framework had remained relatively stable for the twenty-nine-year period running from June 1992, when the Court decided

11. U.S. Const. amend. V.
12. Pennsylvania Coal, 260 U.S. 393; Lingle, 544 U.S. at 539 (observing that all of the takings tests developed by the Court “share a common touchstone” in attempting “to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”).
14. See supra note 7. In addition to being literally underinclusive (not all property-burdening governmental acts are regulations), the term “regulatory taking” is now treated by the Court as a legal conclusion that refers not to an act’s ultimate compensability but rather to the type of scrutiny to which it should be subjected. See Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (distinguishing the per se analysis associated with “physical” takings—even when the appropriation is accomplished through a regulation—from the analysis applicable to “regulatory takings”). It is therefore useful to have a less freighted term for referring to the entire doctrinal area dealing with instances in which the government allegedly commits a taking without invoking the apparatus of eminent domain.
Lucas v. South Carolina Coastal Council,16 to June 2021, when the Court decided Cedar Point. Because the core features of this analytic framework have been recounted in copious detail elsewhere, I provide just a brief overview here.

Under the old regime, there were two per se rules, both fairly narrow, that could automatically make something an implicit taking: if it worked a permanent physical occupation, or if it deprived the owner of all economically beneficial use of the property.17 The first of these rules invited some definitional quibbles about each of its key terms (“permanent,” “physical,” and “occupation”) but remained well-bounded by them. Loretto v. Teleprompter, the case establishing this rule, held that a legal requirement that owners endure the permanent placement of cable wires and boxes on their facades and rooftops worked a per se taking.18 Notably, the size of the physical occupation was irrelevant to the takings inquiry, bearing only on the appropriate amount of just compensation.19

The second per se rule, the “total taking” concept established in Lucas v. South Carolina Coastal Council,20 generated larger conceptual difficulties. It is impossible to say whether “all” of something has been taken without defining the thing in question— all of what?21 The Court revisited this so-called “denominator problem” in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, which stated that the denominator is not defined by the time slice affected by a temporary measure like a moratorium on building,22 and, more recently, in Murr v. Wisconsin, which created a multi-factor test for deciding what denominator should apply in cases involving land.23

Lucas also laid out a powerful per se defense. If the government action in question was merely carrying out “background principles”— inherent limits on title— then it could not be a taking because the owner

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17. See, e.g., Lingle, 544 U.S. at 538 (setting out these per se rules).
19. See id. at 436–37 (“[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.”) (footnote omitted).
21. For example, if one of two adjacent lots is rendered valueless by a governmental action, has “all” value been eliminated, or only half? The answer depends on whether the property interest in question is defined as the individual lot or as the combined set of two lots. See Lucas, 505 U.S. at 1016 n.7 (recognizing this “denominator” problem).
never had that right to start with.\textsuperscript{24} This generated a baseline problem: what counts as a background principle? Justice Scalia, writing for the majority in \textit{Lucas}, made clear that he meant to refer to something more deeply rooted in the common law than harm prevention, with nuisance law serving as the prototypical example.\textsuperscript{25} The Court later held in \textit{Palazzolo v. Rhode Island} that the fact a law was in place when the landowner took title does not transform it into a background principle that would preclude his challenging it as a taking.\textsuperscript{26} But the outer bounds of the concept remained hazy.

If the above \textit{per se} rules didn’t provide an answer, the alleged taking would be assessed under the three-factor test established in \textit{Penn Central Transportation v. City of New York}—a pliable inquiry that examines (1) the economic impact on the landowner; (2) the degree of interference with distinct investment-backed expectations; and (3) the character of the government action.\textsuperscript{27}

Although the \textit{Penn Central} Court provided little guidance about the meaning of these terms, it illustrated the “character” factor by stating that “[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.”\textsuperscript{28} The idea of “adjusting the benefits and burdens of economic life” connects conceptually with the more demanding notion of “average reciprocity of advantage” that has long weighed against finding a taking.\textsuperscript{29}

\textsuperscript{24} For example, no one has a right to commit a nuisance on their land, so statutes that do no more than control common law nuisances are not takings. \textit{See Lucas}, 505 U.S. at 1029–30; \textit{see also infra} Part 1.B.3 (examining the Court’s “background principles” exception in more detail).

\textsuperscript{25} \textit{See Lucas}, 505 U.S. at 1026–31.

\textsuperscript{26} 533 U.S. 606, 626–30 (2001).


\textsuperscript{28} 438 U.S. at 124 (internal citation omitted).

\textsuperscript{29} Justice Holmes used the phrase “average reciprocity of advantage” in \textit{Mahon} to distinguish a case in which coal companies were required to leave a column of coal in place between mines in order to protect workers from flooding in the adjacent mine. 260 U.S. at 415 (distinguishing \textit{Plymouth Coal v. Pennsylvania}, 232 U.S. 531 (1914)). He had used the phrase two months earlier in a case involving a defendant’s removal, under state law authority, of an unsafe party wall constructed by the plaintiffs. \textit{Jackman v. Rosenbaum Co.}, 260 U.S. 22, 30 (1922). Although longstanding, average reciprocity is far from self-explanatory (what are the relevant benefits and burdens, at what level of generality?). In general, the more immediately and directly a regulation returns reciprocal benefits to the burdened landowner, the less likely it will be to count as a taking, other things being equal. But fully reciprocal benefits are clearly not necessary to avoid a finding of a taking. \textit{See Penn Central}, 438 U.S. at 140 (Rehnquist, J., dissenting) (arguing that the historic preservation legislation at issue in the case, which was held not be a taking, failed
revisited four years later in *Loretto*, which partially replaced the multi-factor analysis with a *per se* rule for permanent physical occupations.\(^{30}\) But 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.

This regime held until *Cedar Point*, which made all physical invasions presumptively subject to a *per se* rule (with various exceptions), while leaving in place (for now) the pre-existing rules for assessing restrictions on land use. These developments will be examined in much more detail below. For present purposes, it is enough to have absorbed the main features of the old regime, which are summarized in Figure 1.\(^{31}\)
Although this framework is no one’s model of clarity, it was a sturdy structure that managed, however inelegantly, to accommodate most of what came along in recent decades without the need for major structural renovations.32

However, a strange and poorly theorized annex to this structure—exactions—lurked ominously in the corner, its role in the story not yet well defined. Conceived as a “special application” of the

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32. Although there have been a number of takings cases that refined aspects of this framework, the only major structural change in the last twenty years was the Court’s excision from takings analysis of the question whether a regulation “substantially advance[s] legitimate state interests”—a means-ends formulation from Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), that the Court removed from its takings analysis in Lingle v. Chevron, 544 U.S. 528, 540–45 (2005).
The unconstitutional conditions doctrine, the Court’s exactions jurisprudence began in 1987 with Nollan v. California Coastal Commission. In that case, a landowner who wished to build a larger beach house was told he could do so only if he opened up a walking path across his oceanfront property. The Court held that this bargain violated the Constitution because it required the landowner to trade away his right to just compensation (which, by assumption, he would have been entitled to receive had the government simply appropriated an easement across his land) for something that lacked an “essential nexus” to the impacts that animated the initial restriction on rebuilding. The rebuilding ban was designed to maintain “visual access” to the beach, whereas the walking path would provide actual access—an insufficiently tight connection, the Court held, making the deal “an out-and-out plan of extortion.”

The 1994 case of Dolan v. City of Tigard added a requirement of “rough proportionality” between the impacts justifying the initial restriction and the concession required to lift it. There, the landowner’s permit to expand her plumbing store, which would increase traffic and runoff, was conditioned on providing land to the government in the form of a bike path and a greenbelt drainage area. These conditions satisfied essential nexus, the Court held, but not rough proportionality: the city made no showing of how much the traffic and runoff would be increased by the expansion, or how much the concessions of land would do to absorb it. This level of scrutiny is quite unusual; typically, the government does not bear the burden of justifying its acts in such detail. Yet because both Nollan and Dolan...
involved explicit concessions of real property (permanent, continuous public access to specific pieces of land), exactions doctrine remained rather limited in scope.\textsuperscript{40}

That changed in 2013, with \textit{Koontz v. St. John’s River Water Management District}.\textsuperscript{41} There, the Court held that exactions scrutiny applied to an alleged demand that the landowner, who wished to develop property containing wetlands, either put more of it under a conservation easement or pay for mitigation efforts to be performed on other land. Because exactions analysis is triggered only when the concession in question would be a taking on its own (or else the predicate of trading away one’s constitutional right to compensation would be absent), \textit{Koontz} further held, \textit{contra} precedent, that any payment “linked to a specific, identifiable, property interest” counts as a \textit{per se} taking—unless, of course, it is the sort of tax or fee that doesn’t amount to a taking at all.\textsuperscript{42}

This same pattern of announcing a broad \textit{per se} rule to reach unwanted governmental actions, coupled with exceptions meant to immunize all the legal features that the Court wishes to preserve intact, is repeated in \textit{Cedar Point}. And importantly, exactions crop up in \textit{Cedar Point} as one of the enumerated exceptions to the Court’s new \textit{per se} rule.

2. Where We Are Now

Figure 2 represents an attempt to construct an updated flow chart for implicit takings, post-\textit{Cedar Point}.\textsuperscript{43} As a comparison between the two figures suggests, implicit takings has gotten a good bit more complicated. Although one of the changes depicted in the chart was ushered in by \textit{Koontz} (the monetary exactions on the right-hand branch of the analysis), \textit{Cedar Point} brought exactions directly into the

\textsuperscript{40} See \textit{Lingle v. Chevron}, 544 U.S. 528, 546 (2005) (“Both \textit{Nollan} and \textit{Dolan} involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.”).

\textsuperscript{41} 570 U.S. 595 (2013).

\textsuperscript{42} \textit{Id.} at 614–16; \textit{see id.} at 623–30 (Kagan, J., dissenting) (criticizing the majority’s reasoning on this point).

\textsuperscript{43} I created Figure 2 based on my reading of \textit{Cedar Point} as it interacts with prior implicit takings doctrine. For analysis and citations supporting the contents of the boxes and the connections between them, see \textit{infra} Parts I.B and C.
implicit takings analysis in a way that is likely to increase recourse to this mode of reasoning on both the physical and use restriction sides.

Figure 2: The New Implicit Takings Flow Chart

There is much to quibble with in this chart, from formatting to wording, and I do not recommend it to anyone as a teaching tool. But laying out the components of the analysis in this manner allows us to attempt a better, functional remapping of the terrain once we have worked through its features. Like the Secret Passages that connect the opposite-corner rooms on the Clue game board, different paths often
lead to the same analytic place, which may appear in more than one spot in the chart. If the point of the structure is, as I argue, to selectively apply scrutiny rather than to generate predictable answers, these modes of analysis, and the various pathways to them, should be our central concern. Nonetheless, we can use this provisional map to get started.

3. Two Doors

As we enter the escape room, we encounter two doors that lead into different sectors. One is marked “physical” and the other “use restrictions.” The floor plan used to be a bit more open, but Cedar Point heavily reinforced the dividing wall between these two realms. So our first choice point is determining which sector we’re in. Luckily, this part seems fairly easy, at least when we’re talking about real property (as I will be in this essay).

Does the challenged action involve physical access by the government or a third party, for any period, no matter how brief, or allow or require any object owned by the government or a third party, no matter how small, to enter or remain on the property of the landowner? In other words, does the challenged government action in any way impinge on the owner’s “right to exclude”? If the answer is “yes,” then we go on into the “physical” room. We’ll head there first. If, instead, the challenged action only restricts the owner’s ability to use or benefit from her own land holding, without anyone or anything physically crossing her property line, then we’d go into the “use restrictions” room, which we’ll check out later.

B. Physical Takings

All right! Here we are in the “physical” sector of implicit takings. Thanks to Cedar Point, everything that happens in here might (or might not) be a per se taking. There are lots of people milling around in here, from meat inspectors to labor organizers, along with seeing eye dogs, cable boxes, and much, much more. Not to mention all the people who are protected by antidiscrimination laws, rent control laws, and so on and so forth. It’s crowded! But not to worry—several escape hatches

44. See Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071–72 (2021) (sharply distinguishing “physical appropriations” from “use restrictions”). Below, however, I will raise some questions about whether this wall is really as stable as it first appears. See infra Parts I.B.5 and I.C.4.
45. See infra Part I.C.
The Court enumerates three exceptions to its new *per se* rule in *Cedar Point*: isolated trespasses, background principles, and exactions.\(^\text{46}\) It also alludes to another broad exception to the *per se* rule, where the land in question is open to the public.\(^\text{47}\) With those clues in hand, we can start looking for ways out.\(^\text{48}\)

1. The Open Door

Perhaps the simplest way for the government to escape liability for a *per se* physical taking is to establish that the landowner actually invited the intrusion. A property owner’s right to exclude has always been conditioned by the owner’s choice to “open the door.” As James Penner has emphasized, property works like “a gate, not a wall.”\(^\text{49}\) To invite someone in is not a violation of your property rights but rather an instantiation of them. This logic holds even if the party invited in is the government, or someone whose presence is authorized by the government.\(^\text{50}\)

But what if you mean to open up your door *just so much*—for some people or uses and not others? In distinguishing *PruneYard Shopping Center v. Robins*,\(^\text{51}\) a case involving a state constitutional right to leaflet in a private shopping mall, the Court indicated that *Cedar Point’s* new *per se* rule does not apply to property that is open to the general public, although it did not explain why.\(^\text{52}\) The Court also included a *cf. cite to Heart of Atlanta Motel v. United States*,\(^\text{53}\) a case that rejected a takings challenge to civil rights laws that forbid discrimination in public accommodations.\(^\text{54}\) Apparently, then, a government access requirement does not work a *per se* taking if the owners have opened up the property to the public at large—even if the owners would prefer to

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\(^{46}\) *Cedar Point*, 141 S. Ct. at 2078–80.

\(^{47}\) Id. at 2076–77 (distinguishing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)).

\(^{48}\) As we will see, “out” may not lead to a no-takings conclusion, but rather to some further layer of scrutiny. Thus, the treatment that a particular physical incursion will receive depends not just on whether an exception applies, but also on which exception is thought to apply.


\(^{50}\) There is a caveat: if the door is opened in exchange for some benefit that the government provides to the landowner, then this might be analyzed as an exaction, as explained below. See *infra Part I.B.4.

\(^{51}\) 447 U.S. 74 (1980).

\(^{52}\) *Cedar Point*, 141 S. Ct. 2076–77. The theory might be that once the person has been invited as part of the public, limits on their activity can be overridden without implicating the right to exclude, although this argument has some serious weaknesses. See *infra Part I.B.5.


\(^{54}\) Id., cited in *Cedar Point*, 141 S. Ct. at 2076.
exclude some people or uses.55

What if you are a property owner who has not opened up your property to the *entire* public, but rather only to a subset of nonowners? *Cedar Point* provides definitive guidance where the subset in question consists of your own workers—at least when they live off-site, as was the case for the growers who challenged the California labor regulation.56 The case thus stands for the property owner’s right to open the door just to the workers themselves, without any obligation to admit anyone else by virtue of having admitted those workers (unless some other exception applies).

Now let’s consider what happens when a property owner opens the door to her tenants, or to workers who will live on her property. Here, we might look to *Yee v. City of Escondido*, which upheld an ordinance that protected mobile home residents against rent increases imposed by the owner of the mobile home park.57 In an opinion by Justice O’Connor, the Court rejected the park owners’ characterization of the situation as one of physical occupation, observing that “[p]etitioners voluntarily rented their land to mobile home owners,” and that the “tenants were invited by petitioners, not forced upon them by the government.”58 The rent control law was thus treated as a regulation of the *use* of land, not a physical invasion of it.

Significantly, the *Yee* Court reached this conclusion even though the tenants were allowed to remain for less rent than the owners wanted to charge, and could only be evicted if the owners wished to change the land use and provided six to twelve months of notice.59 Hewing to *Yee*, it might seem that there is no per se physical taking associated with regulating the landlord-tenant relationship in ways that enable the tenant (or any other initially authorized resident) to remain in place for a longer time or on terms different from those the landlord contemplated. It seems possible, even likely, that the Court might revisit *Yee* in a future case and impose some limits on this form of the open-

55. It might, however, still be a *Penn Central* taking. Notably, the access requirement in *PruneYard* itself was analyzed under *Penn Central* (before the Court concluded that it was not a taking), and it seems unlikely that the Court meant to undo this backstop in *Cedar Point*. See infra Part I.B.5.
56. *See Cedar Point*, 141 S. Ct. at 2069–70 (observing that none of the workers employed at Cedar Point Nursery or at Fowler Packing Company resided on the property).
58. *Id.* at 527–28.
59. *See id.*
door argument. But for now, the initial invitation may work to preclude application of a per se rule in similar situations.

Could this same open-door theory be extended to laws granting access to people who are associated with a tenant, such as guests, medical workers, lawyers, health assistants, or even union organizers? The answer is unclear. If so, it could neatly accommodate past labor law cases like NLRB v. Babcock & Wilcox, which suggested that union access would be permissible—without compensation—where workers live at the worksite and there is no other realistic way for organizers to reach them. This approach would also avoid disturbing the New Jersey Supreme Court’s decision in State v. Shack, which recognized limits on a property owner’s right to keep resident workers from receiving on-site legal and medical assistance. Ultimately, this limiting move may prove too far out of step with the Court’s ongoing property agenda, but for the moment, it offers a potential way to cabin Cedar Point.

60. A possible hint in this direction appears in the Court’s recent per curiam opinion striking down the CDC’s August 2021 eviction moratorium. Alabama Ass’n of Realtors v. Dep’t of Health and Human Services, 594 U.S. ___ (2021). The decision, rendered by the same six-justice majority as in Cedar Point, was based on the view that the CDC lacked authority to issue the moratorium, not on takings analysis. Nonetheless, the Court observed that “preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude.” Alabama Ass’n, slip op. at 7 (citing Loretto v. Teleprompter, 458 U.S. 419, 435 (1982)). The Court’s invocation of Loretto, a physical takings case, rather than Yee, which was analyzed as a use restriction, might be read as portending a shift in the treatment of exclusion rights in landlord-tenant contexts. See Robert H. Thomas, SCOTUS Strikes Down CDC Eviction Moratorium And Leaves Tantalizing Clues About Takings, INVERSECONDEMNATION.COM (Aug. 26, 2021), https://www.inversecondemnation.com/inversecondemnation/2021/08/scotus-strikes-down-cdc-eviction-moratorium-and-leaves-tantalizing-clues-about-takings.html (interpreting the Court’s failure to mention Yee as giving “a boost” to pending takings claims against eviction moratoria). Cedar Point itself cites Yee in an ambiguous way, placing it alongside Horne in a discussion about the use and misuse of the term “regulatory taking.” 141 S. Ct. at 2072. In context, the citation might be read either to reaffirm that the case truly involved a use restriction and hence was properly analyzed as a “regulatory taking,” or that it is instead an example of how “that label can mislead.” See id.; see also supra note 14 and accompanying text (discussing the term “regulatory taking”).

61. 351 U.S. 105, 112–13 (1956). Justice Kavanaugh joined the majority opinion in Cedar Point but wrote separately to assert that the outcome was also supported by Babcock, “because the California union access regulation intrudes on the growers’ property rights far more than Babcock allows.” 141 S. Ct. at 2080 (Kavanaugh, J., concurring). Yet the majority’s per se rule, which Kavanaugh claimed to adopt, is pointedly indifferent to whether one law intrudes “more” or even “far more” on property rights than another. A different way of harmonizing the Babcock line with Cedar Point is to understand it as defining the edges of an open-door exception to the per se rule.

62. 277 A.2d 369, 374–75 (N.J. 1971). It is possible that this case might instead be accommodated under state law “background principles.” See infra note 104 and accompanying text.
Another open-door argument relates to construction on land. Suppose a government regulation requires that a firm doing construction work must bring with it certain items of safety equipment or machinery, or that certain supervisors must be present. These are physical encroachments mandated by government, but they are part and parcel of the owner's decision to have the work performed. By opening the door to a contractor, a landowner may be said to have opened the door to the regulatory features that govern that contractor. This approach would usefully foreclose a large set of complaints over routine regulations. A disadvantage (for the Court) is that it moves us conceptually very close to the labor organizer situation. If the physical manifestations of a regulatory apparatus can follow the work crew onto the land under an open-door theory, why do they not also follow the farm worker?63 Difficulty in drawing such distinctions might push the Court to accommodate construction encroachments under a different escape clause—either as a background principle or an exaction—though those routes have their own drawbacks.64

A similar open-door theory might also be used to accommodate antidiscrimination law. Civil rights laws are premised on the idea that regulated actors who make certain kinds of opportunities available cannot make them selectively unavailable based on protected characteristics like race, religion, or gender identity. The Cedar Point Court embraced that logic for property that is open to the general public, as noted above. But much of antidiscrimination law regulates exclusion decisions on private property that is not open to the general public. 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. Moreover, civil rights laws may require landowners to permit people with disabilities to bring assistive devices or service animals onto such private property,65 or to make reasonable modifications on the property (such as allowing a tenant to install grab bars at her own

63. Another interesting example involves “parking lot laws” that require private businesses to allow workers to bring guns onto the property and keep them stored in their cars during the workday. See Joseph Blocher & Noah Levine, Constitutional Gun Litigation Beyond the Second Amendment, 77 NYU ANN. SURVEY AM. L. (forthcoming 2022), available at https://ssrn.com/abstract=3926851, at 10-12 (describing these laws and analyzing their interaction with Cedar Point’s holding).

64. See infra Parts I.B.3 and 4.

65. See, e.g., 24 C.F.R. § 100.204 (b) (providing the example of a seeing eye dog to illustrate a “reasonable accommodation” under the Fair Housing Act).
expense).66 Could all these laws now be viewed as per se physical takings?67

Such a conclusion seems unimaginable, but Cedar Point makes it harder to articulate why not. After all, civil rights laws do cut into an owner’s unfettered right to exclude, though for obviously compelling reasons.68 The Court cannot throw all antidiscrimination law on access-restricted private land under the per se takings bus without suffering a devastating loss of legitimacy. But it may not be willing to grant a blanket exception for the entire topic area either, as making the whole of antidiscrimination law a “background principle” would do.69 A likely middle ground would involve pairing an open-door exception to the per se rule with a backstop of Penn Central scrutiny—a possibility I explore in more detail below.70

There is another consideration. Most door openings of the sort likely to be at issue here will be, at least implicitly, in exchange for something valuable, like the right to run a business or to be a landlord. That sets up an exchange dynamic that might call to mind the rigorous exactions framework developed in Nollan, Dolan, and Koontz.71 Yet the Court gave no sign that it was reinterpreting PruneYard as a stealth exactions case in which the right to open one’s business to the general public is conditioned on the duty to allow leafleting, nor did it suggest the exactions tests of essential nexus and rough proportionality would apply. To the extent that the Court uses this open-door theory beyond the facts of PruneYard itself, it may be effectively endorsing an “exactions-lite” analysis that impressionistically determines that the owner agreed to a package deal in which the benefits justify the burdens.72

66. See 42 U.S.C. § 3604(f)(3)(a) (describing “reasonable modifications” that must be allowed under the Fair Housing Act).


69. See infra Part I.B.3.

70. See infra Part I.B.5.

71. See supra notes 33–42 and accompanying text.

72. See infra note 132 and accompanying text (discussing the possibility of multiple tiers of exactions scrutiny).
2. Out of Bounds (Trespass)

One of the three exceptions expressly articulated in Cedar Point is for trespasses—“isolated physical invasions”—that do not rise to the level of takings.73 These are distinguished by the Court from “appropriations of property rights,” which are always takings if they compromise the right to exclude (again, unless some exception applies).74 Making the distinction was easy in Cedar Point because the California regulation amounts to an explicit grant of access to union representatives. Cases where the government simply acts without writing itself a grant of access may be trickier, as the dissent suggests: How many times can a public school bus stop for a picnic on private land before it becomes a taking?75

Although the Court does not express it in quite these terms, the best way of understanding this distinction is by recalling the purpose of takings law, as articulated in Lingle v. Chevron.76 It is not to keep the government from doing improper things; that is the work of other laws and other parts of the Constitution. Rather, it is to keep the government from unduly burdening certain parties when it does proper things.77 Thus, we can distinguish lawful exercises of government power from negligent accidents that might cause an invasion, or even purposeful misfeasance or malfeasance that results in some physical presence or incursion. Only when the government acts lawfully and purposefully in undertaking or authorizing an invasion (whether through a law or a tacit policy) is takings analysis implicated. A lawless or accidental intrusion may be a tort, but it is not a taking.78

Understood in this way, this exception does not help the government limit its exposure for physical incursions. The Court is not offering governments a way of channeling their legitimate government acts in a manner that will avoid the Takings Clause but is rather observing that some government actions lack the legitimacy necessary

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74. See id. at 2078 (emphasizing “the distinction between trespass and takings”).
75. Id. at 2088 (Breyer J., dissenting).
77. See id. at 543 (observing that the Takings Clause “does not bar government from interfering with property rights, but rather requires compensation ‘in the event of otherwise proper interference amounting to a taking.’”) (quoting First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 315 (1987) (emphasis added by the Lingle Court)).
78. See Cedar Point, 141 S. Ct. at 2078 (“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.”).
to trigger the Takings Clause. In other words, the “trespass” exception is a way out of the per se takings trap, but it will likely land the government (or the third party it authorized) in some other sort of trouble for acting improperly.

Along similar lines, this exception might be tied to the Takings Clause’s public use limitation. The liability rule regime\(^79\) established under the Takings Clause only applies to instances in which the government acts for public purposes.\(^80\) When an act is accidental or unlawful, this will not be the case. Although damages might still be awarded, there would be no just compensation due under the Takings Clause, because there would be no legitimate government act for such compensation to validate.

3. The Invisible Baseline (Background Principles)

The next way of avoiding liability for a per se physical taking under Cedar Point is to invoke “background restrictions,” or limitations on property that inhere in title.\(^81\) The notion originated in Lucas as an exception to its per se rule, though it applies broadly across takings analysis. The core idea is simple: if an owner never had a particular right in the first place, it cannot have been taken. Writing for the Lucas majority, Scalia used common law nuisance principles (even if embodied in statutes) as his primary examples of background principles, although he also referenced the public necessity rule that lets a government actor destroy property without paying compensation when necessary to control a spreading fire.\(^82\) Later, in Palazzolo v. Rhode Island, the Court made clear that a regulation does not turn into

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\(^79\) I use the term “liability rule” here in the sense developed in Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972). A liability rule, in Calabresi and Melamed’s schema, permits the unilateral transfer of an entitlement upon the payment of a stipulated amount; by contrast, property rule protection precludes transfers unless and until the owner receives a price she agrees to accept. See id. at 1092.

\(^80\) See, e.g., Kelo v. City of New London, 545 U.S. 469 (2005) (following past decisions equating “public use” with “public purpose”). The Court recently denied certiorari in a case implicating the public use clause that could have provided an opportunity to revisit Kelo; See Eychaner v. City of Chicago, 495 U.S. ___ (2021) (denying certiorari). Justice Thomas dissented from the denial, joined by Justice Gorsuch; Justice Kavanaugh also would have granted certiorari. Significantly, any narrowing of “public use” should—if logic is any guide—also narrow the range of implicit takings by removing more incursions from the realm of legitimate government actions for which just compensation would serve as validation.

\(^81\) Cedar Point, 141 S. Ct. at 2079.

\(^82\) Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 n.16. (1992). See also David A. Dana & Thomas W. Merrill, Property: Takings 118–20 (2002) (discussing this doctrine, which is also known as “the conflagration rule”).

Electronic copy available at: https://ssrn.com/abstract=3918054
a background principle simply because the property has changed hands after its enactment, but did not address how or when statutes could become background principles.\footnote{533 U.S. 606, 626–30 (2001).}

How do background principles work in the case of physical incursions? Notably, the \textit{Cedar Point} majority anchors its analysis in the faux bedrock of Blackstonian “sole and despotic dominion,” approvingly invoking a vision of property that operates “in total exclusion of the right of any other individual in the universe.”\footnote{Cedar Point, 141 S.Ct. at 2072 (quoting 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766)).} This might suggest that any inherent limits on exclusion would be few and far between. Yet property scholars recognize Blackstone’s definition of property for the hyperbole that it was; Blackstone didn’t believe it, as his own writings make clear.\footnote{See, \textit{e.g.}, FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985) (“Blackstone’s sweeping definition of the right of property overstated the case; indeed, he devoted the succeeding 518 pages of book 2 of his Commentaries, entitled “Of the Rights of Things,” to qualifying and specifying the exceptions to his definition.”); Thomas W. Merrill & Henry E. Smith, \textit{What Happened to Property in Law and Economics?}, 111 YALE L.J. 357, 361 (2001) (describing Blackstone’s famous definition of property as “clearly a bit of hyperbole and . . . inconsistent with the balance of his treatment of property, not to mention with the complexities of modern property law.” (footnote omitted); Bethany Berger, \textit{Eliding Original Understanding in Cedar Point Nursery v. Hassid}, YALE J. L. & HUM. (forthcoming 2022), available at https://ssrn.com/abstract=3926372, draft at 9–11 (detailing rights of entry recognized by Blackstone and concluding that “Blackstonian property reflects no absolute right to exclude”); Carol M. Rose, \textit{Canons of Property Talk, Or, Blackstone’s Anxiety}, 108 YALE L.J. 601, 602 (1986) (“If those who quote Blackstone’s definition read further, they might come to think that Blackstone posed his definition more as a metaphor than as a literal description—and as a slightly anxiety-provoking metaphor at that.”).} If the Court were to consult history, it would find not a baseline of categorical exclusion, but rather “numerous, robust, rights to enter private property recognized at early American law.”\footnote{Berger, \textit{supra} note 85, at 2.} The wide gap between absolute exclusion and historical reality, as well the many ways that longstanding principles might be applied to meet today’s challenges, leaves background restrictions—even if firmly rooted in the past—largely up for grabs.

In discussing background restrictions in \textit{Cedar Point}, Chief Justice Roberts gives the examples of nuisance, necessity, criminal law enforcement, and reasonable searches.\footnote{Cedar Point, 141 S. Ct. at 2079.} That suggests he is using the idea in at least roughly the same way as Scalia did in \textit{Lucas}—that is, grounding the concept in certain longstanding common law principles.
and their statutory incarnations.\textsuperscript{88} Justice Kennedy, however, had endorsed a more capacious vision of background principles in his concurrence in the judgment in \textit{Lucas}, which proved influential among lower courts\textsuperscript{89}—a trend that might well continue in the wake of \textit{Cedar Point}.\textsuperscript{90} Then-Chief Justice Rehnquist also argued for a broader notion of background principles in dissent in \textit{Tahoe-Sierra}, as a way of contending with claims that making every delay \textit{a per se} taking would be unworkable.\textsuperscript{91} Because the move that the Court made in \textit{Cedar Point} is directly analogous to the one Rehnquist supported in \textit{Tahoe-Sierra}—extending a \textit{per se} rule to reach time-limited instantiations of the same kind of government conduct—we might expect a similar understanding of background principles to emerge. Yet the multiple escape hatches enumerated in \textit{Cedar Point}, with their varying levels of subsequent review, make predictions difficult. Questions abound.

Could longstanding statutory regimes like antidiscrimination law be treated as background principles? Going this route would establish that modern statutes can count as background principles—a proposition the Court might find difficult to cabin. A statute’s longevity alone might not provide the Court with a stopping point that it would find satisfactory. For example, some labor laws long predate some antidiscrimination laws.\textsuperscript{92} Moreover, declaring the whole of civil rights

\textsuperscript{88} See \textit{Lucas}, 505 U.S. at 1028–29 (discussing “restrictions that the background principles of the State’s law of property and nuisance already place upon land ownership,” which might be embodied in “laws that do no more than duplicate the result that could have been achieved in the courts”). A variety of other limits on property rights have been treated as outside of takings scrutiny, including civil forfeitures and navigational servitudes. See, e.g., \textit{DANA & MERRILL}, supra note 82, at 110–20 (2002); Lee Anne Fennell, \textit{Picturing Takings}, 88 \textit{NOTRE DAME L. REV.} 57, 69–70 (2012).


\textsuperscript{90} In Justice Kennedy’s majority opinion in \textit{Murr}, he quoted language about background principles and their connection to reasonable expectations from his own \textit{Lucas} concurrence, albeit in \textit{cf.} cites. 137 S. Ct. at 1945–46. Some property scholars read \textit{Murr} as an indication of the Court’s movement toward Kennedy’s views on this point. See, e.g., Farber, supra note 5, at 143–46; Timothy M. Mulvaney, \textit{Property-as-Society}, 2018 \textit{WIS. L. REV.} 911, 954–55. But \textit{Murr}’s framing as a case about denominators and the fact it involved what looked like a garden-variety zoning regulation (effectively, a form of large-lot zoning) make it far from clear that the Court really meant to embrace an inclusive understanding of background principles across contexts.


\textsuperscript{92} For instance, the National Labor Relations Act was passed in 1935, extending rights to
law a background principle might preclude the Court from using *Penn Central* as a backstop in this area.93

Could health and safety inspections qualify as background principles? To the extent regulation of certain trades through inspections is of long standing, the background principle idea might work. Construction-related encroachments might similarly be handled as a background principle. Yet many modern safety and health measures have no precise analogue in the early common law (consider, for example, the requirement of a portable toilet on a jobsite).94 This objection could be met by reaching for a higher level of generality and declaring all “health and safety measures” to be background principles. But just as Scalia worried in *Lucas* that any regulation could be framed as “harm prevention” by any legislator without a “stupid staff,”95 the Court might worry that these terms are too easily manipulable by governmental entities.96

A more tailored approach would be to recast inspections as administrative searches that satisfy the Fourth Amendment. The *Cedar Point* majority signaled its amenability to this approach by citing *Camara v. Municipal Court of City and County of San Francisco*, a case involving administrative searches.97 Although it might seem rather mysterious why satisfying another constitutional provision would exempt an invasion from Takings Clause analysis, Roberts locates the answer in the fact that “a property owner traditionally had no right to

organize and protecting against interference with those rights. Although certain civil rights protections appeared in the nineteenth century, some of the most important civil rights statutes reaching private conduct did not appear until the 1960s, and others have been added even more recently. For example, the Fair Housing Act only extended protections to families with children and people with disabilities in 1988; the Americans with Disabilities Act was enacted in 1990.93. The Court could attempt to characterize only certain civil rights protections as background principles, depending on how long a given protection has been recognized. But doing so would make Swiss cheese out of complex modern civil rights laws and raise questions about whether the relevant date was a statute’s enactment (or amendment) or the judicial recognition of a specific protection. State and local civil rights protections, enacted at various times and sometimes offering more protection than the corresponding federal statute, complicate things further. The Court will likely find it easier to use some version of an open-door theory to move all of antidiscrimination law into a more malleable analytic mode. I thank Molly Brady for discussions on these points.

94. See 29 C.F.R. § 1926.51(c) (OSHA regulation requiring toilets at construction sites).


96. Of course, it is not at all clear that the idea of “background principles” is any less malleable. *See Lucas*, 505 U.S. at 1054–55 (Blackmun, J., dissenting) (criticizing “the Court’s reliance on common-law principles of nuisance in its quest for a value-free takings jurisprudence” and observing that nuisance liability turns on determinations of harmfulness).

exclude an official engaged in a reasonable search.”98 In other words, a background principle pulls searches out of Takings Clause analysis. Interestingly, governmental parties may now attempt to characterize more acts as searches, at least to the extent that establishing the reasonableness of an administrative search proves less burdensome than having to pay just compensation for a taking or meet heightened exactions scrutiny.99

The “search” exception might also be used to square Cedar Point with Wyman v. James, which upheld a requirement that welfare recipients allow government caseworkers into their homes.100 That case actually held that the “home visit” was not a search at all, but rather a reasonable condition on receiving welfare (with no hint of the heightened scrutiny the Court would later apply to conditioned benefits in the property arena).101 However, Wyman also held in the alternative that if it were a search, it was a reasonable one.102 It seems unlikely the Court meant to overrule Wyman, but distinguishing the intrusion at issue there from the one in Cedar Point requires either finding a background principle to do the job or bringing the home visit successfully through some other escape route.103

98. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021). Moreover, following the logic of Lingle, unreasonable searches (ones that violate the Fourth Amendment) should also fall outside of Takings Clause analysis, because they represent acts that the government cannot engage in at all, not ones that can be validated by payment of just compensation. The remedies would be those available for violations of the Fourth Amendment, not the Takings Clause.

99. Whether these requirements turn out to be less burdensome in a given instance depends on the doctrinal intricacies surrounding administrative searches, the details of which are beyond the scope of this essay. For a recent example of administrative search analysis involving personal property, see Taylor v. City of Saginaw, 2021 WL 3745345 (6th Cir. 2021) (holding that suspicionless tire-chalking to enforce parking restriction was not a valid administrative search because it did not offer the subject of the search “an opportunity to obtain precompliance review before a neutral decisionmaker,” did not involve a “closely regulated industry” and did not serve any special law enforcement needs) (quoting City of Los Angeles v. Patel, 576 U.S. 409, 420, 424 (2015)).

100. 400 U.S. 309 (1971). Barbara James, the plaintiff in Wyman, objected on multiple constitutional grounds, invoking the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Fourteenth Amendments, as well as raising statutory claims. See id. at 314. The Court’s analysis focused on the Fourth Amendment question.

101. Id. at 317–18.

102. Id. at 318–25.

103. Exactions analysis is the most likely candidate, but would involve applying significantly more scrutiny than the Court applied in the original case. See infra Part I.B.4. Another possibility would be some version of the open-door theory based on the recipient’s supposed consent. See Wyman, 400 U.S. at 317–18 (“If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be.”). Yet this view would be strikingly inconsistent with the Court’s exactions jurisprudence, in which consent is irrelevant if the choice is deemed to be unduly coercive, and one need not accept the bargain in order to be able to challenge it as unconstitutional. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586,
Because background principles are generally a matter of state property law, common law doctrines that vary by state, such as the public trust doctrine or specific rules of accretion and avulsion, can fit in here as well. Similarly, some state courts might deem certain protections for workers or tenants to be inherent limits on title that cabin the ability of an employer or landlord to exclude.\textsuperscript{104} But there is an important caveat: a plurality of the Court in \textit{Stop the Beach Renourishment v. Florida Department of Environmental Protection} stood ready to invalidate as a “judicial taking” any state court decision that diverged too sharply from past precedent.\textsuperscript{105} The baseline, the plurality insisted, must remain fixed—though no one knows for certain how long of a history is sufficient to establish a background principle.\textsuperscript{106}

One final point is worth emphasizing: background principles are strong medicine. Once something is designated as a background principle, it is immunized against all implicit takings claims—not just the \textit{per se} claims associated with physical access.\textsuperscript{107} This has to be the case, because to call something an inherent limit on title is to say that it is not part of the owner’s property rights package at all. Thus, if “preserving health and safety” is broadly declared a background principle in order to save inspections, then use restrictions carried out for health and safety purposes would never be takings either, even if they leave land valueless forever—an unlikely conclusion for the current Court to endorse. Yet narrowing the scope of the background principle so that it only reaches health and safety inspections would curiously invert the heightened protection against physical invasions that \textit{Cedar Point} sought to achieve.

There is a notable tension here: applying a broad \textit{per se} rule generates a great deal of pressure for categorical exceptions to avoid a flood of litigation. Yet those same exceptions may end up leaving more exposure for property owners than a world in which a looser test

\textsuperscript{104} This is one way of understanding the limits that the New Jersey Supreme Court placed on the ability of an employer to exclude visitors attending to the medical and legal needs of workers residing on site. See \textit{State v. Shack}, 277 A.2d 369, 372 (N.J. 1971) (“Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.”). I thank John Infranca for discussions on this point.

\textsuperscript{105} \textit{560 U.S. 702} (2010).

\textsuperscript{106} In \textit{Stop the Beach}, the relevant precedent dated back to the 1920s. \textit{Martin v. Busch}, 112 So. 274 (Fla. 1927). For further data points on this question, see Blumm & Wolfard, \textit{supra} note 89, at 1182.

\textsuperscript{107} \textit{See, e.g.}, Blumm & Ritchie, \textit{supra} note 89, at 327 (“The background principles inquiry authorized by \textit{Lucas} is an absolute defense to any takings claim.”).
applies to all enactments—unless the exceptions get routed somewhere else for another layer of scrutiny. For this reason, the open-door theory (outlined above) or exactions analysis (to be taken up next) may be preferred by the Court over an approach that toggles directly between a per se taking and the per se exception of background principles. For a Court that wants to extend blanket protection against physical incursions to property owners while maintaining fine-grained control over the content of the exceptions, the preferred egress from the per se rule would lead not to a no-liability conclusion, but rather to another test.

4. The Constricting Hoops (Exactions)

*Cedar Point* also presented exactions—bargains with the government—as a potential way to transform what would otherwise be a per se taking into a nontaking. Although the majority made this sound like a simple escape route, it may turn out to be a false door or even a trap for the government. The Court assumed that typical inspections could easily meet the twin requirements of essential nexus and rough proportionality laid out in *Nollan* and *Dolan*, respectively. But the application of exactions analysis to inspections is not as straightforward as the Court suggests.

It is worth initially noting the oddness of casting exactions in the redemptive role contemplated by the Court. Because exactions scrutiny is so much more exacting than the analysis that generally applies to governmental actions, governments have generally tried to avoid having regulatory schemes characterized as exactions. But *Cedar Point* flips the script by making every minor grant of access a per se

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108. *See generally id.* (observing that while *Lucas’s* per se takings rule is rarely applied, its “background principles” exception has spawned many categorical defenses to takings claims that strengthen the government’s position); *Farber, supra* note 8 (discussing the likelihood that landowners will lose more than they gain from *Cedar Point* as a result of this dynamic).

109. Might background principles themselves recursively build in further takings tests rather than merely create a safe harbor from takings analysis? Clearly, background principles can embed complex doctrinal standards on the front end (such as whether something counts as a nuisance) and can also dictate that a government action exempted from takings analysis be analyzed under a different constitutional standard, such as the Fourth Amendment. Yet to use the idea of background principles to move among takings tests would be a different, and more circular, enterprise. *See infra* notes 128–132 and accompanying text (discussing the possibility that the Court means to tier its exactions analysis in a similar manner, perhaps based on the harmfulness of a given property use).


111. *See supra* notes 33–40 and accompanying text (describing these requirements).
taking (unless some exception applies). As one of the Court’s enumerated exceptions, exactions analysis now appears in the analysis not as a threat to government action but as a potential means of dodging liability for a taking.

Notably, the Court has never explicitly decided whether exactions scrutiny even applies to “legislative” requirements that operate across the board, as opposed to individualized administrative or adjudicative bargains of the sort at issue in *Nollan*, *Dolan*, and *Koontz*. Yet *Cedar Point* indicates that one way to keep access regulations (which are set out in generally applicable terms) from counting as *per se* takings is to analyze them as part of an exchange. This tacitly assumes the exactions framework applies in this setting, at least in a redemptive role. And by invoking the tests in *Nollan* and *Dolan*, the *Cedar Point* majority suggested that it had in mind full-strength exactions scrutiny, not the sort of rational basis review that would normally apply to routine governmental acts. As I will discuss below, what might look like a lifeline thrown out to the government in the *per se* realm might turn out to be a snare in the use restriction realm, if it means a broad extension of exactions scrutiny to legislative enactments.

Is the Court right that inspections and the like will easily pass heightened exactions scrutiny? Let’s examine the moving parts. As an application of unconstitutional conditions doctrine, an exaction always has two components: a governmental *benefit* that could be legally granted or withheld, and a requested *concession*—some property interest of the individual that the government would ordinarily have to pay just compensation to obtain. See, e.g., California Bldg. Indust. Ass’n v. San Jose, 577 U.S. 1179 (2016) (Thomas, J., concurring in denial of certiorari) (noting the “important and unsettled issue” of whether the exactions framework applies to legislative enactments, on which lower courts have been divided). See also Fennell & Peñalver, *supra* note 5, at 295–97, 340–46 (discussing this undecided question).

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112. See, e.g., California Bldg. Indust. Ass’n v. San Jose, 577 U.S. 1179 (2016) (Thomas, J., concurring in denial of certiorari) (noting the “important and unsettled issue” of whether the exactions framework applies to legislative enactments, on which lower courts have been divided). See also Fennell & Peñalver, *supra* note 5, at 295–97, 340–46 (discussing this undecided question).

113. *Cedar Point*, 141 S. Ct. at 2079. The fact that the Court follows its articulation of the *Nollan/Dolan* test with an invocation of a more lenient test, *see id* (citing Ruckelshaus v. Monsanto, 467 U.S. 986 (1984)), raises some doubt on this point, however. *See infra* notes 128–132 and accompanying text. Another interesting question is whether the nexus and proportionality tests might be applied differently in a legislative context, based on the overall operation of a given provision rather than with respect to each individual instance. I thank Aziz Huq for discussions on this point.


115. *See Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (discussing constitutional limits on requiring a party to give up the right to just compensation “in exchange for a discretionary benefit”).
a particular kind of business. *Cedar Point* fills in the second term by specifying that any grant of access, no matter how limited (unless otherwise excepted) is a *per se* taking for which just compensation would ordinarily be required.\footnote{116. *Cedar Point*, 141 S.Ct. at 2072–74.} *Nollan* and *Dolan* test the relationship between these components.\footnote{117. See *supra* notes 33–40 and accompanying text.}

For essential nexus to exist, the reason for *not* granting the license must be the same reason that the government is asking for the concession.\footnote{118. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 836–37 (1987) (setting out the “essential nexus” requirement).} Consider factory safety inspections. The reason the government might withhold a license to operate a factory is a fear that it will be operated unsafely. This is the same reason that the government would want to have inspections (assuming the inspections reasonably detect, deter, and correct unsafe conditions). Thus, essential nexus is satisfied. Rough proportionality is another matter. Here, it is not enough that a logical connection exists between the reason the government would have for withholding a license and the concession that it is requesting. Instead, the government must show that the extent of the concession is at least roughly equivalent to the harms that would otherwise ensue if the government were to simply grant the license.\footnote{119. See *Dolan*, 512 U.S. 374, 391 (describing the “rough proportionality” standard).} How does this work? We might say that the safety inspection must do only (roughly) what is necessary to meet the risk of unsafe conditions, but how much inspection access is too much?

One approach would be to start by calculating the costs of unsafe conditions. But how can we know how unsafe the factory would be, absent inspections? Even if we could gather this data, how do we assess the proportionality of the required inspections? Is the requirement that they be no more frequent than necessary to deter? Is the analysis a sort of least intrusive means test that pushes governments to inspect less frequently yet fine more heavily in order to achieve the maximum degree of deterrence at lowest “invasion cost”?\footnote{120. Cf. Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–79 (1968) (observing that the expected utility of crime is influenced by both the probability and the severity of punishment).} Or perhaps proportionality simply requires comparing the safety benefits of an inspection with the magnitude of the burden imposed on the
landowner during the time it takes to do the inspection.\textsuperscript{121}

Regardless of the exact formulation, making the necessary showing is likely to be nontrivial. Notably, the government must affirmatively establish nexus and proportionality, in an inversion of the usual way that burdens are allocated in evaluating government action.\textsuperscript{122} This requirement would likely raise the costs of inspections, reducing resort to them as a regulatory strategy. The same might be said of exactions as a response to construction-related encroachments. Although there will always be a building permit in the story that could serve as the hook for requiring a concession, applying essential nexus and rough proportionality to justify every physically mandated facet of every construction project could quickly become cumbersome.

There is, of course, no reason to think that the Court is opposed to health inspections or construction safety.\textsuperscript{123} Any erosion in these domains would just be collateral damage in the Court’s quest to stamp out unwanted impositions on property owners. Routing more regulations through exactions analysis allows the Court to pick and choose which kinds of impositions on property it will or will not tolerate—but not costlessly. It can try to do the same thing by selectively recognizing background principles, though not without risking unintended exposure for property owners as noted above. Alternatively, the Court could expand on the open-door theory above. Doing so is conceptually treacherous (why has the door not also been opened to labor?) but it does allow a soft landing in *Penn Central*-land.

Another point, easy to miss in the majority opinion, may also dramatically limit the reach of the exaction exception. The Court maintained that exactions analysis could not save the access requirement at issue in *Cedar Point* itself, because “the access regulation is not germane to any benefit provided to agricultural

\textsuperscript{121} See Fennell & Peñalver, supra note 4, at 293 n.28 (observing that *Dolan* “left ambiguous whether it is the harm eliminated by the exaction that must be proportional to the harm the development causes or whether it is the burden of the exaction (to the landowner) that must be proportional to those harms.”). Focusing on harm suffered by the landowner, depending on how it is measured, might more readily satisfy proportionality—indeed, perhaps too readily for the Court’s liking.

\textsuperscript{122} See supra note 39 and accompanying text.

\textsuperscript{123} There is also no reason to think that most commercial landowners are opposed to inspections, which may not only inspire consumer confidence but also raise the costs of entry by competitors.
employers or any risk posed to the public.”124 Of course, California’s law could be rewritten conditionally to say that in exchange for the benefit of operating an agricultural facility the growers must allow access to union organizers. But the Court cuts off this possibility. The “not germane to” language might suggest the Court is (only) summarily deciding in advance that no such access law could ever meet the essential nexus requirement.125 Yet the Court goes further, citing *Horne v. Department of Agriculture* for the proposition that “‘basic and familiar uses of property’ are not a special benefit that ‘the Government may hold hostage, to be ransomed by the waiver of constitutional protections.’”126 That language suggests we would never even reach exactions analysis, because there could be no (real) benefit in the picture that might validate what would otherwise be a *per se* taking.

Complicating that interpretation, however, is the fact that *Horne* referenced similar “no benefit” language in *Nollan*, the case that established the first prong of the Court’s rigorous exactions test.127 In *Nollan*, the Court distinguished *Ruckelshaus v. Monsanto*, where it had rejected a claim that requiring data from a pesticide producer amounted to an unconstitutional condition, explaining that “as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.”128 This is a rational-basis-style inquiry that is nothing like the exactions test the Court developed in *Nollan* and *Dolan*. *Nollan* rejected the *Monsanto* approach on the grounds that the right to build on one’s land “cannot remotely be described as a ‘governmental benefit.’”129 This is a baffling statement, given that the existence of a discretionary government benefit is an essential ingredient of any exaction; it is what the government offers in exchange for a property concession.130 Apparently, the permit in *Nollan* was enough of a benefit

125. *Id.* at 2080; see Nollan v. California Coastal Comm’n, 483 U.S. 825, 836–37 (1987).
126. See *id.* (quoting Horne v. Department of Agriculture, 576 U.S. 351, 366 (2015)).
127. *Horne*, 576 U.S. at 366 (citing *Nollan*, 483 U.S. at 833 n.2). I thank Chris Elmendorf for discussions on this point.
130. See Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (explaining that under *Nollan*, a landowner cannot be required to cede property without just compensation “in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no
to qualify for exactions analysis, but not enough of a benefit to get the Monsanto treatment.

To recap: the Cedar Point Court suggests that inspections can easily pass Nollan and Dolan (a rigorous test), then cites Monsanto for good measure (which applies a much more lenient test), then asserts that the union access requirement could never pass muster because it does not involve a government benefit that can be “h[e]ld hostage,” using language from Horne (which found a taking without reaching exactions analysis at all), which referenced similar language in Nollan, that in turn was used to distinguish Monsanto.131 What are we to make of this pattern of clues?

We know this much: the Court wants a test that health and safety inspections will easily clear and that union access requirements cannot pass under any circumstances. Can it reliably get there with a single exactions test, or does the Court mean to ease the analytic pressure by declaring some kinds of exchanges unworthy of exactions analysis at all? Alternatively, or in addition, does it mean to say that certain kinds of exchanges get more lenient Monsanto treatment, not full-strength Nollan/Dolan treatment?132

Sitting squarely in the middle of this muddle is the elephant in the room: zoning. Permission to build on one’s own land was deemed to not constitute a government benefit in Nollan, but the fact remains that such permission is tightly controlled through zoning and permitting processes that the Court surely does not mean to cast doubt upon. If a restriction is valid, how can lifting it not count as a benefit? If running an agricultural enterprise is the kind of “basic and familiar use” that cannot be held hostage, how can it be said that putting a duplex or even an apartment building on one’s own plot of land is somehow less basic or less familiar? Yet presumably the Court wants to allow zoning prohibitions that rule out these and many other uses, even if it also wants to strictly control bargains to lift them.133 If the idea is to stamp

131. See supra notes 110–130 and accompanying text.

132. Chris Elmendorf has suggested the Court may have had something like this in mind, invoking Robert Ellickson’s distinction between “normal” and “subnormal” uses to determine the kind of exactions scrutiny to be applied. See Chris Elmendorf (@CSElmendorf), T WITTER, (June 29, 2021, 2:46 p.m.), https://twitter.com/CSElmendorf/status/1409986672784076800?s=20 (citing Robert C. Ellickson, Suburban Growth Controls, 86 YALE L.J. 385 (1977)).

133. This points up an incongruity that has existed in exactions analysis since its inception: the fact that land use restrictions are subjected to a much more lenient test than the bargains to lift them. See e.g., Lee Anne Fennell, Hard Bargains and Real Steal: Land Use Exactions Revisited, 86 IOWA L. REV. 1 (2000).
out restrictions imposed simply for leverage, then making them inalienable in this way offers a roundabout way to undercut that incentive.134

If the “no benefit” language in Cedar Point means that some uses cannot be conditioned on government access at all, even if the access condition satisfies nexus and proportionality, this represents an important limitation. In such cases, the exactions route would be a false door that cannot, in fact, be opened. On this interpretation, the Court would be dramatically restricting the government’s ability to engage in bargains at exactly the same moment and with exactly the same pen stroke as it has suddenly and dramatically increased the need for governments to resort to such bargains in order to govern. Before Cedar Point, governments did not need to bargain for every entry necessary to carry out a regulatory program. The case summarily eliminates that power, throws out exactions as a lifeline, but then (perhaps) retracts it if the land is being used in a “basic and familiar” way.

5. The Mystery Flume (Penn Central and Physical Takings)

We have already seen that some of the escape hatches from per se takings in the physical realm lead not to a conclusion of no liability but rather to some further analytic waystation. This is most evident in the case of exactions, where escaping the per se frying pan means landing in the fire of heightened scrutiny. Similarly, isolated trespasses by the government that don’t qualify for takings analysis can still give rise to liability as torts or otherwise.135 Background principles, however, seem to flip a binary on/off switch that toggles between a per se taking and no taking at all, even though there might well be differing degrees of “backgroundedness”—how firmly embedded a particular principle is in background understandings of limits on property, or how much consensus surrounds that legal conclusion. To declare something a background limitation on title is to cede all control over it under the Takings Clause, which the Court may not want to do broadly. Yet the very breadth of Cedar Point will demand broad exceptions, if courts do not wish to be overrun with takings cases over trivial instances of

135. See discussion supra Part I.B.2.
governmental access.

The open-door theory, although not well developed in *Cedar Point*, raises another possibility: diverting access requirements that follow from voluntarily assumed limits on exclusion into a *Penn Central* analysis. To be sure, the notion of a direct flume chute from the *per se* takings realm to *Penn Central* operates in significant tension with *Cedar Point*'s reinforcement of the wall between use restrictions and physical takings. Indeed, the Court explicitly banished the *Penn Central* test from the physical realm in *Cedar Point*: “Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.” This is an odd statement, given that *Penn Central* itself illustrates its third factor, the character of the government action, by reference to whether it is physical in nature. But perhaps the Court means to place great weight on the word “appropriation” in that sentence, treating it as a legal conclusion that does not really reach all government actions that involve grants of physical access.

Because alleged implicit takings that don’t qualify for *per se* treatment have traditionally wound up in a *Penn Central* analysis, it seems likely that they will continue to do so, even if they are, or initially seem, physical in character. Notably, *PruneYard* was analyzed under *Penn Central*. Because Roberts was focused on dismissing this inconvenient precedent as irrelevant to the *Cedar Point* outcome, he did not say what happens in the open-to-the-public cases of the future. But it seems unimaginable that they would get less scrutiny than before. If variations on this open-door argument are used to save laws from *per se* takings status, as discussed above, it is a sure bet that the Court will still wish for them to receive some takings scrutiny (such as not allowing eviction moratoria to go on too long, or not allowing rent control laws to protect too broadly).

Assuming *Penn Central* analysis remains a backstop for some physical incursions that escape the *per se* grip of *Cedar Point*, this would be a remaining point of contact between the analytic structure

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139. This assumes that they do not qualify for one of the Court’s other exceptions.
140. Justice Rehnquist, writing for the Court in *PruneYard*, articulated the *Penn Central* factors (albeit without identifying them as such) in working through the takings analysis. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–83 (1980). He also cited *Penn Central* in an earlier footnote. *Id.* at n.7.
for use restrictions (which still uses \textit{Penn Central} as the default) and that for physical takings (which are now categorically \textit{per se} takings, unless an exception applies). How should we interpret that connection? There are at least two possibilities.

One is that the physical takings realm remains outfitted with a vestigial \textit{Penn Central} scrutiny area for addressing open-door cases. This is likely to feel analytically unsatisfying for a Court that is determined to grant absolute priority to the owner’s right to exclude. The other option is to deny that any taking that does not qualify for the \textit{per se} rule could ever be a \textit{physical} taking at all—an interpretation that seems more consistent with the Court’s statements in \textit{Cedar Point}. Thus, the open-door theory might be interpreted as a judgment that the encroachment is not really physical after all (despite having a physical manifestation), but rather is only, at base, a restriction on use. In this scenario, some laws that start off in the physical takings realm would be reclassified as they ride the flume into the use restriction area, where they could safely receive \textit{Penn Central} treatment.

This latter alternative would be consistent with the Court’s reasoning in \textit{Yee}, which read limits on the power over one’s invited tenants as a regulatory rather than physical matter.\footnote{\textit{Yee v. City of Escondido}, 503 U.S. 519 (1992).} It could also offer a way to explain away \textit{Prune Yard}, by focusing on the fact that the \textit{person} would have been welcome as a member of the public but for their \textit{behavior} (leafletting, rather than shopping), so the state constitutional provision only expanded what behaviors were permitted. But this theory quickly runs into serious problems.

For starters, why can’t the shopping mall say that it means to let in “shoppers” but not “leafleters” in the same way that an employer might wish to allow in “employees” but not “former employees” even though the same human being might occupy both roles over the course of time? Antidiscrimination laws are even harder to harmonize with this theory because the owner may really mean to exclude particular people (employees or tenants, say) because of their protected characteristics.\footnote{One might argue that the owner had \textit{actually} invited in “any person with x qualifications,” and then characterize as regulatory the limits on decisionmaking that follow—but there is a somewhat circular nature to this argument that depends on accepting the law’s judgment about what kinds of invitations can and can’t be issued to prospective tenants and employees. These normative precepts could, of course, be treated as background principles, which would pull the area out of takings law altogether—a normatively desirable result, but one that it is unclear the Court will embrace.} \textit{Yee} spoke to this issue in countering claims that the rent control law
deprived the park owners of the chance to choose new incoming tenants: “Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.”¹⁴³ That analysis suggests that opening one’s door to “others” is enough to make any subsequent restriction on exclusion regulatory rather than physical in nature, a conclusion at odds with *Cedar Point*’s holding.

There is a further problem in distinguishing the *Cedar Point* situation from the one in *Pruneyard*. It is unclear how requiring an owner to suffer leafleting represents a restriction on the owner’s use of her own property, which is seemingly necessary to bring the situation under the Court’s looser “use restriction” standard.¹⁴⁴ The only “use” of the owner that is being legally constrained is the owner’s exercise of a right to exclude (here, by ejection). One could say the same of an access requirement that does not allow the owner to exclude a government agent or third party in the first instance—that it is only forbidding the “use” of excluding the person. Is it really any less of an imposition on the right to exclude to say that a person engaging in unwanted behaviors on one’s property cannot be asked to leave?¹⁴⁵ In both cases, the legal requirement to allow the person to enter or remain on the land may, as a practical matter, limit what the owner can do on her own land, whether through disruption or by taking up space needed for some other use. But, again, that does not serve to distinguish between the cases.

More foundationally, exclusion is of little value to an owner if it is not paired with the right to *selectively include* and to make use of the property in the ways the owner wishes (and not in other ways).¹⁴⁶ Most

¹⁴³.  *Yee*, 503 U.S. at 530–31; see also *CDK Global v. Brnovich*, 16 F.4th 1266, 1282 (9th Cir. 2021) (citing *Yee* in rejecting a takings challenge to a law that prevented database providers who licensed their databases to dealers from excluding third parties from that data).

¹⁴⁴.  *See Cedar Point*, 141 S. Ct. at 2071 (“When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner’s ability to use his own property, a different standard applies.”).

¹⁴⁵.  There is an odd formalism in making so much turn on the initial invitation to enter, regardless of what happens thereafter, as if takings law has adopted the terms of engagement associated with vampires. *See Gwen Seabourne, Vampire Property Law: Fiend Simple Absolute in Possession? BRACHTON’S SISTER* (Nov. 3, 2021), https://vifgage.blogs.bristol.ac.uk/2022/01/21/vampire-property-law-fiend-simple-absolute-in-possession/ (discussing the rule that vampires may never enter a home unless they are invited in, but may exploit an unsuspecting victim’s misperceptions about their identity and purpose to gain admittance).

¹⁴⁶.  Thomas Merrill makes these points in one of the most exclusion-centric academic pieces of the past half-century, which is cited approvingly by the majority in *Cedar Point*. *See Thomas
property theorists who center their analysis on exclusion see it as a means to an end—being able to use your property as you wish. And even when exclusion is sought for reasons other than making use of the property oneself—James Stern gives the example of an owner who does not want to allow neo-Nazis to hold a rally on his property—it is the owner’s ability to control or veto uses on the land that remains paramount. Presumably the owner’s exclusion rights would be no less compromised if the neo-Nazis initially posed as birdwatchers to gain entry by invitation and the owner was then forbidden to expel them once they began waving banners and shouting slogans.

To be clear, I am not suggesting that the Court’s fetishizing treatment of exclusion rights should extend to use rights as well—none of these rights should be treated as absolute, nor could they be (as the Court’s various exceptions amply illustrate). Rather, I mean only to emphasize the instability of fixating on the circumstances of an initial boundary crossing, if the concern animating implicit takings is supposed to be about compensating excessive burdens on owners. This is all the more true when we recognize that modern conditions make physical exclusion less and less relevant to the ability of owners to derive value from their resources.

W. Merrill, Property and the Right to Exclude, 77 NEB. L. REV. 730, 740 (1998) (“As Blackacre’s gatekeeper, A [the owner] has the power to determine who has access to Blackacre and on what terms.”) (emphasis added; footnote omitted); id. at 740–45 (arguing that all of the core rights in property, including the right to use, can be derived from the right to exclude).

147. See, e.g., J.E. PENNER, THE IDEA OF PROPERTY IN LAW 71 (1997) (presenting his “exclusion thesis,” which maintains that “the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things”) (emphasis omitted); Henry E. Smith, Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law, 94 CORNELL L. REV. 959, 964 (2009) (“[E]xclusion is a means to an end and not an end in itself, and is far from absolute even as a means. No one except a fetishist would believe that exclusion is a positive good, but the right to exclude indirectly serves a wide—and, crucially, only vaguely specified—set of interests.”) (footnote omitted). See also Thomas W. Merrill, Property and the Right to Exclude II, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 25 (2014) (“Exclusion is not a goal or valuable end of the institution of property. It is a critical feature that produces a variety of ends, many good, some bad.”).


149. See id. at 39 (“[T]he right to exclude can be redefined as the right to prohibit one or more persons from using a particular resource, either at all or in some category of ways.”).

150. See Lingle v. Chevron, 544 U.S. 528, 539 (2005) (describing takings jurisprudence as burden-focused); see also Armstrong v. United States, 364 U.S. 40, 49 (1960) (explaining that the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”).

151. See generally Lee Anne Fennell, Property Beyond Exclusion, 61 WM. & MARY L. REV. 521 (2019) (questioning the primacy of exclusion as the hallmark of property rights).
Yet, if the Court truly wishes to elevate exclusion over all other interests, the sorts of recharacterizations necessary to turn *PruneYard* into a use restriction case would expose, and contribute to, weaknesses in the wall separating the physical and regulatory realms. Nearly every regulatory scheme has some physical manifestations, even if it is only to ensure that the regulations have been followed. And nearly any physical manifestation of a regulatory system can be recharacterized as essentially restrictive in nature. The expansion of the *per se* rule on the physical side of the wall will heighten the incentive for creative recharacterizations. If the Court is committed to maintaining a wall between the sectors, keeping *Penn Central* as a safety valve on the physical side could help reduce the pressure on the wall itself.

### C. Use Restrictions

The main action in *Cedar Point* takes place in the newly renovated physical takings room. On its face, nothing in the opinion addresses government actions that do not result in physical boundary crossings, but that instead restrict or otherwise negatively affect how the landowner can use or benefit from her land. But let’s take a look around the use restriction sector of the Court’s escape room anyway. As all home renovators know, upgrading one part of the house often leads to dissatisfaction with other parts. The same principle applies, one might suppose, to designers of escape rooms. So our tour will include discussion of some likely upgrades and rearrangements. We will also note some points of contact between the sectors, including the possibility, raised above, that *Penn Central* analysis might feature in both.

1. Out of Bounds, Again (Illegitimate Government Actions)

Recall the trespass/takings distinction developed back in the physical takings realm, one of several exceptions enumerated in *Cedar Point*. I suggested that this exception is best understood as a kind of threshold inquiry into whether we are dealing with the sort of purposeful and legitimate governmental action that can be validated by compensation. The same dichotomy applies here in the use restriction sector. Once we reach the point of asking whether something is a taking, we have already decided (at least provisionally) that it is not a violation of some other binding law or constitutional
This distinction between legitimate and illegitimate government action matters, because a wholly permissible remedy for a taking is just compensation: the governmental action can continue unabated as long as the owner gets paid. On the other hand, if the government act runs afoul of the Constitution in other ways, or is *ultra vires* under some other binding law, the government may simply be compelled to stop doing it. We can again invoke the public use limitation in the Takings Clause to flesh out this point. If what the government is doing does not align with a public purpose, it cannot possibly be validated through the payment of just compensation, and thus cannot amount to a takings issue.

To be clear, this way of exiting the implicit takings escape room offers no respite for the government—it is a way out of the analytic structure but not a way to save the law or act in question, which is, by hypothesis, invalid.

2. The “Too Far” Treadmill

In *Pennsylvania Coal v. Mahon*, the putative origination point of regulatory takings, Justice Holmes set out the oft-repeated maxim that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” All of the implicit takings tests devised between then and now are (at least in theory) meant to determine how far is too far, or, put another way, when a governmental action amounts to the functional equivalent of eminent domain. Although the distance metaphor invokes a scalar concept, the takings inquiry asks a binary question. The Court has tried to draw the “too far” line through a mix of *per se* and balancing tests, as noted above. The way in which the Court has defined “too far,” however, has hardly managed to isolate for compensation the most severe impositions on property owners—as we can easily see by glancing back into the physical takings sector and noting the minor, temporary incursions that

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152. See Lingle v. Chevron, 544 U.S. 528, 543 (2005) (“[T]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”).

153. See id. at 543 (“No amount of compensation can authorize [an impermissible] action”).


155. See Lingle, 544 U.S. at 539.

156. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1233 (1967) (observing that, notwithstanding Holmes’s language, “the test poses not nearly so loose a question of degree; it does not ask ‘how much,’ but rather (like the physical-occupation test) it asks ‘whether or not’”).
now count as *per se* takings.

At the moment, a finding of a taking seems less likely in the use restriction realm the “less far” it goes in burdening the landowner. Significantly, however, *Cedar Point* justifies its across-the-board *per se* rule in the physical realm by emphasizing that takings liability is already scaled to reflect the severity of the violation of property rights through the calculation of just compensation. The idea that a burden’s severity goes only to compensation is currently confined to *Cedar Point*’s discussion of physical takings, but it is anyone’s guess how long this notion will remain limited to that context. An extension of *Lucas’s per se* rule, following the logic of *Cedar Point*, might be justified in just this manner. So while going “less far” currently reduces the risk of takings liability for a use restriction, this result is contingent not only on the precise interplay of the *Penn Central* factors but also on the stability of the precedents that currently apply *Penn Central* reasoning to most use restrictions.

3. Avoiding the Void (Total Takings)

In *Lucas v. South Carolina Coastal Council*, the Court articulated a *per se* rule: a government action that eliminates all economically beneficial use of land will be a taking unless the restrictions in question were already part of background principles of law. In addition to raising knotty questions about the content of background principles, *Lucas*’s new *per se* rule introduced the “denominator problem”: how to define the “all” when assessing whether all economically viable use has been eliminated. Although the problem has not been fully resolved, the Court has resisted defining the denominator by reference to the regulation itself—for instance, interpreting a ban on llamas as a “total taking” of an owner’s llama-raising rights. That would be an illegitimate form of “conceptual severance,” a term coined by Margaret Jane Radin to express the Court’s unwillingness to divide up a property holding into its regulated subparts.

The Court’s campaign against conceptual severance reached an

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157. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021) (“The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation.”) (citation omitted).
158. See discussion *infra* Part I.C.4.
160. See discussion *supra* Part I.B.3.
161. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the*
apex in *Tahoe-Sierra*, which involved a moratorium on building near Lake Tahoe that had the effect of removing all economically viable use from the affected properties for a period of years.\textsuperscript{162} The Court declined to treat the total taking of a time slice as a *Lucas* taking, holding instead that this sort of temporary regulation was better handled under the Court’s general-purpose approach for regulatory takings, the multi-factor *Penn Central* test.\textsuperscript{163} The Court did not overrule *Tahoe-Sierra* in *Cedar Point* when it effaced the distinction between temporary and permanent physical invasions. Indeed, Roberts went out of his way to continually cite the case (eight times!) for a variety of basic takings propositions. Yet never at any point did the majority opinion mention *Tahoe-Sierra*’s core holding about time slices, much less suggest that this holding had any relevance to *Cedar Point*.

Although Roberts’s past connection with *Tahoe-Sierra* may have played a role (he successfully represented the Tahoe Regional Planning Agency before the Court), his repeated citations to the case may have been designed to emphasize that the case remained good law and that the Court was not overruling it—at least not yet. In other words, what happens in the physical takings sector stays in the physical takings sector. Nonetheless, the strict compartmentalization that allows *Cedar Point* to coexist with *Tahoe Sierra* may prove difficult to sustain. Indeed, it’s easy to lose our footing when looking at the cases side by side.

4. The Uneven Floor (Can *Tahoe-Sierra* Survive?)

As we continue our tour of the use restriction realm, we can’t help noticing that the floor is tilting rather alarmingly. *Cedar Point* introduced a sharp asymmetry between temporary physical occupations and temporary deprivations of all economically beneficial use. The permanent versions of these government acts had long been subject to *per se* rules under *Loretto* and *Lucas*, respectively. Consistent with its elevation of the right to exclude to the premier position in the hierarchy of property sticks, however, the Court now

\textsuperscript{162} The exact time frame was disputed. The majority focused on a 32-month period, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency* 535 U.S. 302, 306 (2002), while the dissent characterized the development ban as lasting “almost six years,” *id.* at 346–47 (Rehnquist, C.J., dissenting).

\textsuperscript{163} *Id.* at 330–42. The Court did not evaluate the moratorium under *Penn Central* because the landowners failed to appeal the decision below on that ground. *Id.* at 317–18.
views even the most trivial temporal shards of physical access as *per se* takings—again, subject to the various exceptions noted already. But making land totally unusable for several years still gets *Penn Central* treatment under *Tahoe Sierra*. In short, the Court scaled one rule but left the other unscaled.

We can’t expect this asymmetry to last long, especially when governments can often employ use restrictions as substitutes for access-based regulations. Any asymmetry can be resolved in two ways—by making the taller thing shorter or the shorter thing taller. Accordingly, one possibility would be to tone down *Cedar Point* so that its holding looks more like *Tahoe-Sierra*, perhaps by reading it as only applying to access restrictions that lack a defined end date. But nothing in the opinion supports this interpretation, and there is no reason to predict that this gloss will be added later. This limiting principle would only encourage governments to always add an end date (and then change it), which is just the sort of gamesmanship the Court has been trying to preclude in its takings jurisprudence. The other possibility seems far more likely: that at the next available opportunity, the Court will overrule *Tahoe-Sierra* to bring it into line with *Cedar Point*.

All of the conceptual infrastructure for extending *Lucas*’s *per se* rule is already in place, just waiting to be deployed. The idea that just compensation awards can scale to match the temporal extent of the imposition, developed in *Cedar Point*, could be readily transplanted to the total takings arena. And just as *Cedar Point* contained assurances that reaching temporary encroachments would not spell disaster, due to the availability of various exceptions, so too could the same exceptions be invoked in a future case overruling *Tahoe-Sierra*. First, short-term inability to use one’s land might occur through something better characterized as a tort than a governmental action—for example, an improperly blocked road or a power outage—and this would not be a taking. Second, background principles would be brought in to save all kinds of short-term incursions on use (an idea already developed in Rehnquist’s dissent in *Tahoe-Sierra*). Finally, exactions could be used to assess and potentially bless any other short-term use prohibitions, again expanding the footprint of exactions analysis and the heightened scrutiny it brings.

These solutions come with the problems already enumerated, and it is possible that once courts have a chance to gain some experience

164. *See id.* at 351–52 (Rehnquist, C.J., dissenting).
with *Cedar Point*’s framework, the idea of expanding it into the use restriction realm will seem less appealing. But attacking the asymmetry through expansion seems quite likely. Significant, too, is the fact that this move would not threaten traditional forms of zoning, if the Court adopted Rehnquist’s explicitly zoning-friendly reading of background principles in the *Tahoe-Sierra* dissent.165

5. The Constricting Hoops, Again (Exactions)

Recall that exactions analysis was one of the escape hatches enumerated in *Cedar Point* for keeping routine physical impositions from amounting to takings.166 The Court’s suggestion that governments employ the rigorous exactions framework to shield health and safety inspections from its *per se* rule for physical incursions carries large, unacknowledged implications for exactions analysis on the use restriction side of the divide. In offering up the exactions alternative, the *Cedar Point* majority was, perhaps unwittingly, assuming the answer to a still-unsettled question about the scope of exactions scrutiny: whether it applies to legislative enactments that set out conditions for governmental permits in a formulaic, standardized manner.167 Notably, health and safety inspections are typically authorized in just this format, through uniformly applied rules that appear in statutes or regulations, rather than through individualized bargains. This question of scope, which the Court skated past without comment in *Cedar Point*, turns out to be highly consequential for land use restrictions. To see why, consider where exactions analysis stood, pre-*Cedar Point*.

*Nollan* and *Dolan*, the cases setting out the two prongs of Court’s

165. *See id.* (citing the long history of zoning to support the claim that its usual delays cannot count as takings). Indeed, Rehnquist’s *Tahoe-Sierra* dissent might be read to suggest that zoning *itself* is a background principle. *See id.* at 352 (“Zoning regulations existed as far back as colonial Boston . . . . and New York City enacted the first comprehensive zoning ordinance in 1916 . . . .”) (citations omitted). *Cedar Point* does suggest that zoning remains subject to takings analysis of the sort usually conducted under *Penn Central*. *See Cedar Point*, 141 S. Ct. at 2071–72 (listing “zoning ordinances” as one of the “varied” use restrictions to which the “framework” developed in *Mahon*, and now usually addressed under *Penn Central*, applies). Whether longstanding forms of zoning are treated as background principles or given the green light through a *Penn Central* analysis, the result will be the same. This does not mean that everything framed as “zoning” will receive such deferential treatment; we might expect a different approach to inclusionary zoning measures, for example, whether based on their more recent vintage or on other features that are deemed to trigger heightened scrutiny.


exactions test, both involved physical appropriations of interests in land; both also involved “adjudicative” or ad hoc bargains with individual landowners, not broad-brush legislative enactments. 168 Subsequently, *Koontz* expanded the scope of exactions scrutiny by declaring that governmental land use bargains that involve monetary payments fall within the exactions domain. 169 This holding had the effect of making any land use regulation suspect as an exaction if it included an option to pay money to gain permission to do a particular project. 170 But *Koontz* left pointedly unsettled whether legislative enactments, which set out conditions (including monetary ones) in a uniform and predictable manner, are subject to exactions scrutiny. 171 Limiting the domain of exactions to administrative or adjudicative bargaining—a path already taken by some states—would help to avoid some of the uncertainty associated with the otherwise broad reach of *Koontz*. 172 For example, it would automatically exempt generally applicable taxes and fees while leaving individually negotiated monetary payments vulnerable to heightened exactions scrutiny. 173

Such a limitation would also figure prominently in the analysis of many other land use regulations, including inclusionary zoning measures that offer developers the option of paying an “in-lieu fee” rather than actually including affordable units in the development. Although the California Supreme Court held in *CBIA v. San Jose* that inclusionary zoning is simply a form of regulation, and not subject to exactions analysis at all, the question has not yet been reached by the Supreme Court. 174 The ultimate fate of such laws may turn in part on whether the Court decides to adopt the legislative/adjudicative distinction to cabin the domain of exactions analysis. Yet the Court’s latest pronouncement in *Cedar Point*—and potential governmental responses to it—may complicate its ability to do so.

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169. See *supra* notes 41–42 and accompanying text (discussing this expansion).
170. Justice Alito stated in *Koontz* that even one valid option would allow an exaction to pass muster, but his analysis made the opposite point. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 611 (2013). The landowner in *Koontz* could have instead elected to conserve more of his own land, yet the fact that he could avoid that concession through the option of paying money doomed it in Alito’s eyes. But that’s always how alternatives work—doing one relieves you of doing another—making it impossible for any one invalid option to avoid infecting all the others on Alito’s reasoning.
171. See, e.g., Fennell & Peñalver, *supra* note 4, at 325 (noting this lacuna).
172. See, e.g., *id*. at 340–46 (discussing this distinction and its implications).
173. See *id*.
Significantly, *Cedar Point* seems to contemplate governmental bodies using exactions analysis as a shield to save many routine access grants from counting as takings. Governments may feel compelled to take this lifeline and subject their legislative schemes involving physical access to the essential nexus and rough proportionality requirements of *Nollan* and *Dolan*. Similarly, if the prediction above about *Tahoe-Sierra* is correct, they may soon be pushed to reach for the same lifeline to validate a wide range of short term restrictions on use, many of which may be legislative in nature as well (including, for example, waiting periods before evicting tenants). In so doing, are governments resigning themselves to a world in which many more legislative enactments regarding land use will be subject to this searching form of heightened scrutiny?

If so, this lifeline works like a kind of trap, one that further advances the creep—or march—of exactions into the heartland of land use regulations. Yet presumably the Court wants to keep traditional forms of zoning from receiving such scrutiny, since some of the most widespread and deeply entrenched zoning classifications, such as single-family-only residential zones, could not survive it. So we may see some new annexes to the doctrine that attempt to selectively expose laws to, and shield them from, the heightened scrutiny of exactions analysis.

6. The Balance Beam (*Penn Central*)

Now we come at long last to the humble balance beam: the government’s last best chance to get out of the escape room unscathed. The default workhorse of implicit takings has long been the free-form balancing test set out in *Penn Central*, which requires consideration of three not-especially-definitive factors: the economic impact on the landowner; interference with distinct, investment-backed expectations; and the character of the government action.  

175.  See discussion *supra* Part I.C.4 (predicting that the Supreme Court will overrule *Tahoe-Sierra* to bring it in line with *Cedar Point*).

176.  Many land use controls are stated in sufficiently conditional terms as to be amenable to this type of analysis.  See Fennell & Peñalver, *supra* note 5, at 338.  Although what is required of the landowner would need to constitute a taking if simply confiscated on its own in order for exactions analysis to apply, both *Cedar Point* and *Koontz* greatly expanded the categories of *per se* takings.

As the domains of per se tests and exactions analysis have expanded, the remaining domain for Penn Central has shrunk accordingly. That’s not an accident. Yet Penn Central is likely to remain around for the foreseeable future because it offers a handy way to deal with land use restrictions that the Court favors. A forgiving test that is not sensitive to property value losses, Penn Central offers a doctrinal alternative that can insulate from takings liability just about anything that comes its way. At the same time, it could serve in a pinch as a last-chance backstop, should anything that seems to impose too heavily on property rights make it this far.

II. THE SELECTIVE SCRUTINY MACHINE

Now that we have worked our way through the twists and turns of the implicit takings escape room, we can step back and take stock of the system as a whole. This Part argues that the Court has created a selective scrutiny machine designed to apply normative judgments about property rights at every stage as it sorts, filters, and channels property-impacting governmental acts through the maze of rules, standards, and exceptions that make up the current (and future) implicit takings framework. I will start with some general observations about this method of formulating and packaging scrutiny, and then turn to a functional remapping of the modes of analysis that feature in the Court’s handiwork. We’ll end at the cash register, to discuss remedies.

A. Ends and Means

Cedar Point, I have argued, can be best understood as part of an ongoing project of extending heightened scrutiny to regulations impacting property rights—but not all such regulations. Instead, the Court’s implicit takings jurisprudence is structured to selectively apply scrutiny to property-impacting acts. But to what end has this apparatus been constructed? What, exactly, is Court’s selective scrutiny machine for? While it is impossible to know what motivates each Justice, we might reasonably impute a broad orientation to Court’s current and past conservative wings: maintenance of the status quo in general, and its distribution of property wealth in particular. There is nothing

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178. See Krier & Sterk, supra note 7, at 62–66, 87–89 (finding that takings challenges rarely succeed under Penn Central).

179. Notably, status quo preservation is not the same thing as wealth maximization. Zoning often entrenches existing arrangements in service of the risk-averse preferences of homeowners, even when departures from existing patterns would have a higher expected value for those same
shocking about this goal; many would say this is precisely what property law is meant to do. Yet pursuing this program in modern society requires not only some means for attacking certain property-restrictive laws but also some means of protecting other property-restrictive laws from significant scrutiny.

Threading that needle is no mean feat. Making property rights stronger across the board would threaten certain Court-favored regulations, like single-family zoning. Implicit takings is muddled for a reason: it’s tricky to target unwanted property regulations without touching the ones deemed desirable. Significantly, the Court has not elevated property to the status of a fundamental right, so that any acts that impinge on an owner’s interests automatically receive a higher tier of scrutiny. That would put zoning (and much else) on the chopping block. Instead, it is using the trusty Takings Clause to crack down on some, but not all, governmental acts impacting property rights. It is a kind of scrutiny without tiers. And the aim, presumably, is scrutiny without tears—to galvanize property rights without upsetting the regulatory property infrastructure upon which landowners rely.

_Cedar Point_ thus advances a line of doctrine that buffers owners from certain kinds of garden-variety governmental acts by making them more expensive to carry out (either because of the just compensation requirement, the showings that are required to avoid it, or some combination of the two). Yet at the same time, other pieces of

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181. The Court has long employed a “tiers of scrutiny” approach in its constitutional jurisprudence, with fundamental rights and suspect classifications receiving strict scrutiny, while ordinary social and economic legislation receive only rational basis review; a limited “intermediate scrutiny” category has also been recognized. See, e.g., Mario L. Barnes & Erwin Chemerinsky, _The Once and Future Equal Protection Doctrine?_ 43 CONN. L. REV. 1059, 1077–80 (2011). The Court had at times used a verbal formulation suggesting heightened scrutiny (“substantially advance legitimate state interests”) in some of its takings cases, but recanted in _Lingle_, excising that test from its takings jurisprudence. _Lingle_ v. Chevron, 544 U.S. 528, 540–45 (2005). _See also_ Fenster, _supra_ note 15 (discussing _Lingle_ as it relates to the relationship between takings and substantive due process).
the Court’s implicit takings doctrine aim to protect land use restrictions that would be threatened by heightened scrutiny—including much of zoning. The Court, on this view, has tried to craft a Takings Clause that can selectively attack and insulate government acts as needed to protect status quo patterns of property wealth. But because it has not been transparent about this goal, the doctrinal tests offer property owners and governments little guidance—at least if taken at face value.

Our difficulties evaporate, however, if we see implicit takings doctrine as essentially justificatory, and instead ask whether the property-facing law under consideration broadly supports or threatens the status quo wealth structure. Some doctrinal features are more or less explicit about this: reasonable expectations are the product of the existing law; background principles are rooted in the past (which has a particular distributive structure); and average reciprocity of advantage asks whether the landowner is being effectively made whole (or better than whole) by the operation of the same law. But where the intricate detail of the various tests and exceptions does not point clearly to this guiding principle, following the principle rather than the doctrine is likely to yield better predictions.

This observation has a cynical, Legal Realist flavor. But how much does a wealth-preserving goal diverge from what the Takings Clause is meant to do? There is an intentionally counter-majoritarian bent to takings protections, one that means to keep society at large from expropriating wealth from the few. Accordingly, the Court’s precedents have emphasized the need to keep governments from placing unusually heavy burdens on particular landowners that should instead be spread more broadly across society. But the Takings Clause was never meant to stop government from governing, nor from responding to—and producing—social change. Rectifying instances in which owners are singled out for especially burdensome treatment is a far more surgical and less comprehensive project than broadly conserving existing patterns of property wealth. The latter project takes

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182. See Fennell & Peñalver, supra note 4, at 351–52.
185. Notably, Justice Holmes expressed concern in Pennsylvania Coal v. Mahon not just that government be prevented from going “too far” without paying, but that government be permitted to “go on.” See Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).
us some distance from assessing how burdensome a government act is for particular owners, and toward assessing whether the incidence of the burdens overall tends to entrench or threaten existing property wealth patterns.  

Status quo maintenance, then, is a different and broader enterprise than the alleviation of unusually concentrated burdens. Pursuing this goal requires an instrument robust enough to reach even very minor incursions that might leverage changes in existing hierarchies, but tame enough to foster the restrictions that support those hierarchies. Put a different way, it requires a mechanism for enabling and ratifying the (generally robust) political power of homeowners and other well-heeled landowners, while at the same time constraining the political power of those who might erode their holdings. An implicit takings doctrine capable of serving this complex function needs a suite of tools for fine-tuning the treatment that different property-impacting laws receive. So let’s take a look.

B. A Functional Remapping

What would it mean to reconceptualize the implicit takings framework as a selective scrutiny machine? In his section, I attempt a remapping that translates Figure 2’s doctrinal rat’s nest into a set of analytic modes that correspond to different levels of scrutiny. As noted previously, some of those modes appear in more than one place in the implicit takings map sketched in Figure 2; here I consolidate them and note the various routes in and out.

1. Beyond the Pale (Non-Takings Scrutiny)

To start, not every imposition on property rights is a takings problem. A government act must be otherwise legitimate, whether we are talking about a use restriction or some kind of physical access, in

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186. This shift in orientation does not demand that regulations perfectly compensate owners with reciprocal benefits in order to avoid a finding of a taking. Winners and losers are tolerated, even when burdens are substantial, so long as the law does not systematically work against status quo patterns. This is one way of understanding the Court’s decision in Euclid v. Ambler Realty, which upheld a zoning scheme that had the effect of reducing the value of some land by 75% but promised to shield well-off homeowners from changing land use patterns. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

187. See, e.g., Fischel, supra note 179 (emphasizing the political power of homeowners); see also Farber, supra note 5, at 159–61 (observing, following public choice theory, that landowners bearing concentrated burdens will often wield more political power than the general public receiving diffuse benefits).
order for the liability rule regime contained in the Takings Clause to be properly triggered.188 Wrongful or accidental acts may be violations of the law, or of other constitutional provisions, but they are not takings, because they cannot be validated by just compensation. These “beyond the pale” incursions empty out into other realms of scrutiny, outside of the scope of takings concern.

2. Background Principles (No Scrutiny)

We can also dispense with any government action that merely instantiates background principles, which represent inherent limits on title.189 This again is true whether we are talking about physical access or use restrictions. While Cedar Point has put a lot of pressure on background principles, whatever goes in this box slides free and clear to the “not a taking” endpoint. Unlike “beyond the pale” acts, which were not legitimate enough to be takings, “background” acts get ejected from the takings inquiry because they involve entitlements that never belonged to the landowner in the first place.190 Once an act qualifies as a background principle, it receives no further takings scrutiny.191

3. Penn Central (Low Scrutiny)

Penn Central remains, for the moment, the dominant test for use restrictions.192 Use restrictions that do not rise to the level of a total taking under Lucas are analyzed here.193 The Penn Central test will likely also continue to serve as a fallback test for any physical incursions that slip out of Cedar Point’s per se grasp though an open-door theory like the one used to distinguish PruneYard.194 However, the open-door theory often embeds a form of conditionality that begins to resemble the exactions structure.195 This conceptual adjacency could create permeability running in either direction, allowing some conditional encroachments to be handled as Penn Central cases via the open-door theory, and others to be handled as exactions cases.

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188. See supra Parts I.B.2 and I.C.1.
191. A possible caveat is discussed above, if the background principle is understood to bake in some additional takings test. See supra note 109.
192. See supra notes 27–29 and accompanying text (describing the Penn Central test); see supra Part I.C.6 (discussing Penn Central’s current applicability).
193. See supra Part I.C.3 (discussing the Lucas “total takings” rule).
194. See supra Part I.B.3.
195. See text accompanying notes 71–72, supra.
4. Exactions (High Scrutiny)

Exactions receive a heightened level of scrutiny that goes far beyond the usual standard for social and economic legislation. Any government acts routed through this alternative will have to prove up essential nexus and rough proportionality. The typical predicate for exactions scrutiny would be a proffered exchange of a discretionary governmental benefit like a building permit for a concession that would otherwise be a taking on its own. Yet if the benefits in question are implicit ones, and the exchange is tacit in nature, there may be the potential to handle the case under Penn Central based on the kind of open-door reasoning that the Cedar Point Court used to distinguish PruneYard.

There is another caveat. After Cedar Point, some land use restrictions may no longer be candidates for bargain-making, even if the exactions requirements are fulfilled, because the uses in question are too “basic and familiar” to require anything in exchange. Concessions tied to relaxing restrictions on such uses will, therefore, just be takings.

5. Per Se Rules (Infinitely High Scrutiny)

Per se rules might be characterized as involving infinitely high scrutiny, inasmuch as the conclusion of a taking cannot be avoided at all, no matter how weighty the government interest involved. There are exceptions to these rules, but none of the exceptions track the importance of the government interest as such, and hence do not call upon courts to weigh or balance interests. As these observations

196. See supra notes 33–42 and accompanying text.
197. See supra note 39.
198. See supra notes 124–134 and accompanying text.
199. See, e.g., Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071–73 (2021) (discussing the categorical operation of the per se rule for physical takings, which does not involve any balancing or weighing of government interests); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (describing the rule for permanent physical invasions, which requires compensation “no matter how minute the intrusion, and no matter how weighty the public purpose behind it”); id. at 1028–29 (setting out a similarly categorical rule for government acts that eliminate all economic value unless the limitation was inherent in the owner’s title).
200. The “background principles” exception requires examining the historical provenance of the government act. See supra Part I.B.3. The exactions exception requires considering the act’s place in any bargain that the government is striking. See supra Parts I.B.4 and I.C.5. Other exceptions ask whether some other feature of the act (its status as a tort, or its interaction with the owner’s decision to open up the property) pulls it outside of the per se rule. See supra Parts I.B.1 and I.B.2. Although a very weighty government interest would presumably influence how courts interpret and apply the exceptions, it is not an explicit part of the analysis.
suggest, the real work goes into determining whether the per se rule applies or not. This sorting process represents a type of heightened scrutiny in itself, one that now runs the full length and breadth of all physical incursions, and which may in time be extended to the total taking of time slices and perhaps of other functionally or spatially defined subsets of property holdings. The complexity of the doctrinal inquiry raises the costs and risks of lawmaking around property rights.

6. Taking Stock

The scrutiny categories outlined above have something surprising in common: they all apply, at least to some extent, in both the physical and use restriction sectors of the implicit takings inquiry. Thus the first question in Figure 2’s flow chart, which asks whether the encroachment is physical in nature, neither rules out nor in any particular mode of analysis—even though Cedar Point seems to make it the most significant single question that might be asked in an implicit takings discussion. This does not mean that both kinds of alleged takings are treated alike—they obviously aren’t—but rather that we can stand back a bit from the busy detail of Figure 2’s attempt at faithfully mapping the doctrine and offer a different, more functional, way of understanding the field. Figure 3 illustrates.

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201. See supra Part I.B.
203. See generally Christopher Serkin, Insuring Takings Claims, 111 NW. U. L. REV. 75 (2016) (discussing the risks that implicit takings doctrines create for local governments).
204. A borderline case is the Penn Central analysis, which the Court may have meant to excise from its physical takings jurisprudence altogether. Although it seems likely to have a continuing role with respect to some physical incursions that qualify for an exception to the per se rule, it is possible that subjecting them to lighter scrutiny under Penn Central will come with a justificatory recharacterization of the act as really only regulatory in nature. See infra Part I.B.5.
205. I created Figure 3 based on my reading of Cedar Point and the Court’s prior takings case law. It is organized around the levels of scrutiny spelled out in the current section, Part II.B, which distill and remap the doctrinal analysis examined in Part I, supra.
Rather than starting with the doctrinal distinction between physical takings and use restrictions, or even the distinction between per se rules and Penn Central’s amorphous balancing test, Figure 3 inverts the analysis by starting with the exceptions and working down through layers of scrutiny until finally, at the bottom of the chart, we reach the per se rules. Figure 3 thus works through a stack of four questions that collectively determine the level of scrutiny that a given governmental act will receive.
The first question in Figure 3 tosses out government acts that aren’t viable candidates as takings because they aren’t legitimate. These “beyond the pale” acts receive non-takings scrutiny. This includes one-time trespasses, *ultra vires* actions, corrupt dealings, and much more. Although these land in the “not a taking” box, that doesn’t mean the governmental entity or actor might not be in a heap of trouble for other reasons. We’re just talking about takings here.

Figure 3’s second question seeks to identify background principles, which will receive no scrutiny. This question implicates high-stakes normative and practical judgments. If something is a background principle, that’s the end of the story, and it’s “not a taking,” all the way down.

Next, we come to a question that asks about all the flavors of conditionality. Depending on the answer, we may go into a high-scrutiny environment (exactions) or a low-scrutiny environment (*Penn Central*), or continue on toward an infinite scrutiny environment (*per se* rules). As the discussion above suggests, there is not yet any definitive guidance on how different varieties of conditionality will be treated. But exactions scrutiny should only be triggered by a concession that would constitute a taking on its own.206

We get to *per se* rules only at the bottom of the chart, because they are not really *per se* rules until we know that there is no applicable exception. Figure 3’s final question thus asks whether we are dealing with a physical incursion under *Cedar Point* that has made it past all the above exceptions or a total taking situation under *Lucas* that also survived the prior inquiries, including the question of background principles. The answer determines whether we are in the infinite scrutiny realm of a *per se* taking, or pitched out into the residual *Penn Central* category.

Because so many judgment calls go into how a particular fact scenario would move among the boxes, Figure 3 cannot really help anyone determine how their takings case will come out. It can only offer a snapshot of the way pockets of scrutiny are distributed through the inquiry and baked into the sorting process itself. It does, however, expose the pressure points upon which a taking case turns.

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206. This does raise the possibility that the concession component of the situation might need to first be subjected to its own solo run through the chart to see if it is a taking, in order to determine if the bargain should fall into the exactions box. This layer of analysis is built into the conclusion that we are dealing with an exactions situation.
Of course, Figure 3 is just one possible mapping of the Court’s selective scrutiny machine. Further developments in the lower courts or future pronouncements by the Court may rearrange some of the pieces or amend their content in various ways. What seems most certain and least likely to change, however, is the sheer versatility of the machine, and its inclusion of many and varied implements for assessing incursions on property. It contains enough tests, exceptions, rules, standards, qualifiers, and escape hatches to provide whatever degree of scrutiny might be desired in a given situation. But how effective it will be in delivering on the broad goals I have imputed to the Court depends crucially on the applicable remedies.

C. The Cash Register (Just Compensation)

After spending so much time bumbling about in the Court’s implicit takings structure, it can be easy to forget that there is a simple and well-marked way out of the labyrinth: paying just compensation. The mix of exceptions laid out in Cedar Point offers several opportunities for governments to argue that their legislation survives its trip through the scrutiny machine. But in many cases, paying is likely to be cheaper and less risky than attempting to make the necessary showings.

Properly understood, the Takings Clause is not about stopping illegitimate government acts; it is only about requiring the payment of just compensation for legitimate government acts. Thus, any expansion in the domain of implicit takings involves a tacit concession: that the governmental act in question counts as a public use that can be validated by payment. It is impossible to impose just compensation

207. This assumes, of course, that the act is question is otherwise legitimate and thus capable of being validated by payment. Although some commentators have suggested that access restrictions unaccompanied by compensation mechanisms might be enjoined, see Bowie, supra note 67, at 199–200, the governmental actor could avoid that result by simply providing for compensation—something the Takings Clause plainly permits them to do.

208. This is especially true where exactions analysis constitutes the only other plausible way out. Even an ultimate “no taking” result may prove more costly to the government than simply paying just compensation if it is achieved through a route that includes, in addition to litigation, the costs of proving up nexus and proportionality. Moreover, going all-in on the exactions escape route may end up conceding the applicability of the framework to a broader set of restrictions than had previously been recognized—a bad result for government.

209. The notion that the requirement to pay compensation might force a government to internalize more of the costs of its actions and therefore choose its actions more carefully (a claim that may or may not be empirically supported in a given context) is not inconsistent with this observation.

210. The fact that some states have adopted more stringent “public use” requirements than the Court has applied to the federal Takings Clause introduces an interesting wrinkle. Presumably, a state or local governmental access law that fails on public use grounds at the state
obligations without acknowledging the governmental power that lies behind them. So California can keep its labor access law in place if it pays just compensation for the impingement on the property right in question. Importantly, it need not compensate for whatever economic leverage the growers think they might lose if the workers succeed in organizing; that has nothing to do with the property encroachment, but rather involves labor market power dynamics that the landowner has no legitimate right to control.

The relevant figure may turn out to be pretty low. The constitutional standard for just compensation is the fair market value of the property interest in question. While the labor access grant does not seem to fit neatly into any property category recognized under state law, the rental value of the land offers at least a rough point of level could be enjoined, even if it would otherwise meet the federal public use standard that would make it a compensable taking. See Fennell, supra note 88, at 78–79 (discussing possible ways of resolving the conflict between state and federal public use standards). Because these state law standards were developed prior to Cedar Point, when no one thought that brief grants of access counted as takings, their applicability to this context is unclear. I thank David Schleicher for discussions on this point.

211. Justice Kennedy made an analogous point in his concurrence in Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010). Although the plurality plainly saw judicial takings as a way to constrain judicial power, Kennedy observed that recognizing judicial takings implies a judicial power to take. See id at 736–39 (Kennedy, J., concurring in part and concurring in the judgment).

212. Put another way, whatever rights the growers may have in their property does not include a right to keep labor from organizing effectively. If the presence of union representatives on the property is indeed essential to the workers’ capacity to organize, so that property access is a but-for cause of unionization, then this merely implies (contra the distinction drawn to the Babcock line) that there was in fact no other way to reach workers. That might cast doubt on the Court’s analysis, but it cannot possibly give the landowners the right to claim compensation equal to the economic effects of unionization.

213. See, e.g., United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (describing the fair market value standard that constitutes the Court’s general rule for eminent domain compensation).

214. It seems most akin to an easement, but the parties disputed whether it qualified as one under state law. However, the Court found the question irrelevant, observing that there can be a compensable taking even when “the government’s intrusion does not vest it with an property interest recognized by state law, such as a fee simple or a leasehold.” Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2076 (2021). Perhaps the closest analogue recognized under California law would be a “floating easement,” which is defined functionally and is not initially fixed in space, although the parties can later establish its location. See, e.g., Southern California Edison Co. v. Severns, 252 Cal. Rptr. 3d 667, 673 (2019) (“Some expressly granted easements—commonly known as ‘floating easements’—are not specifically defined as to location by the creating conveyance.”).
reference. According to American Farm Bureau numbers, the average annual cash rental rate for an acre of California cropland was $439 in 2020.215 A generous estimate for the space occupied by a standing person is 8 or 9 square feet, but let’s count a quarter acre of space as potentially occupied by the labor organizers, just to account for any wandering around they may do. That gets us to $109.75—for a whole year. California’s regulation allowed labor organizers to be present three hours per day, 120 days per year, for a total of 360 hours out of the 8760 hours in a year—a little over four percent. That works out to a cash value of $4.51.216

Landowners might challenge this calculation on any number of grounds. For one thing, California’s regulation entitles the organizers to access “areas in which employees congregate before and after working” or, during the lunch hour, “at such location or locations as the employees eat their lunch.”217 Depending on the layout of the work site, accessing these areas might require traversing some additional land of the growers. Even if the total square footage taken up by the organizers aggregates to no more than the posited quarter acre for the time allotted, the mobility of the organizers plausibly increases their intrusiveness.218 But there are important limits to this argument. The owners can presumably control where the workers congregate and eat lunch, and should not be able to drive up the just compensation award by needlessly moving these areas far into the interior of their property to increase the amount of real estate implicated. Nor should the compensation award include any disruption to work that results from organizers violating the limits contained in the regulation.219 While such disruptions may be separately actionable as violations of the regulation, they are not part of the governmental grant of access.220

216.  This figure is lower than, but not too far off from, Justice Barrett’s hypothetical of “50 bucks” as just compensation during oral argument. See Transcript of Oral Argument at 70, Cedar Point Nursery v. Hassid (U.S. argued March 22, 2021) (No.20-107).
218.  By analogy, storing bowling balls in a fixed location is a much different thing than rolling them all around a worksite, even if the volume of space occupied over a unit of time is the same in the aggregate in both cases.
219.  The access regulation prohibits “conduct disruptive of the employer’s property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses.” CAL. CODE REGS. tit. 8, § 20900(e)(4)(C) (2020).
220.  Cf. Brown v. Legal Foundation of Washington, 538 U.S. 216, 239 (2003) (observing that no just compensation would be due if clients lost interest due to violations of the rules governing IOLTA accounts, because such losses would be “the consequence of . . . incorrect private
The agricultural rental value is also presumably far less than what a grower would actually charge an organizer for the right to hang around the worksite. But the Takings Clause entitles the government to a liability rule solution. That rules out having to pay the full reservation price that an owner would demand—a point made clear by compensation protocols for eminent domain. Whatever the merits of increasing compensation to account for losses that might go uncompensated by fair market value, it would be highly incongruous to adopt such an approach in the context of temporary grants of physical access but not in the case of full-on eminent domain. Further, just compensation equates to what the owner loses, not what the government gains. Here the owner loses temporary control over some bits of land that are agricultural in character, even if the specific square feet in question would not likely be cultivated in any case.

A more persuasive basis for higher compensation would be that by taking a small bit of physical access, the government has damaged or devalued the whole property, or at least a significant subset of it. A remedy proposed by Abraham Bell and Gideon Parchomovsky for partial takings would grant the landowner a put option enabling her to force the government to take (and pay for) the whole thing or nothing at all. Yet Bell and Parchomovsky recognize a de minimis exception for minute permanent physical occupations of the sort at issue in Loretto—and, presumably, would extend that exception to the other very limited invasions that are now subject to the per se rule under decisions rather than any state action”.


222. See Brian Angelo Lee, Just Undercompensation: The Idiosyncratic Premium in Eminent Domain, 113 COLUM. L. REV. 593 (2013) (surveying and criticizing a number of arguments along these lines); see also Lee Anne Fennell, Just Enough, 113 COLUM. L. REV. SIDEBAR 109 (2013) (responding to Lee).


224. If the organizers simply use the same uncultivated parts of the worksite that the workers use for congregating and eating, there may be no measurable loss of the use of land at all. On the other hand, if the periodic presence of the organizers requires the areas set aside for worker breaks to be incrementally larger than they otherwise would be, then a corresponding increment of agricultural land might become unavailable for cultivation at any time. In the latter situation, the compensation should not be pro-rated based on the hours of presence, though presumably far less than a quarter acre would be added to the break areas to accommodate a few visiting organizers.


226. Id. at 2046.
Cedar Point.\(^{227}\) It might indeed seem excessive to give a grower inconvenienced by a labor organizer access requirement the right to force the state of California to buy its whole farm. Nonetheless, the underlying logic of the argument—that disruption of a portion can damage more than just that portion—might lead to higher compensation awards in cases where minor but disruptive interruptions make the owner less able to use the balance of her property.

Exactions add another wrinkle to the remedial story. While land use exactions involve a demanded concession that would be a taking on its own, owners may or may not agree to the deal. If they refuse and challenge the bargain, no taking has actually occurred, yet there may be some other remedy for the attempted exchange.\(^{228}\) Thus, the conclusion that a taking was attempted (successfully or not) through improper pressure may result in forms of liability different from just compensation. Characterizing access requirements as exactions is not only an imperfect mechanism for avoiding payment obligations, given the rigors and risks of exactions scrutiny, it could even complicate the ability to simply pay for the access.

However, paying for every instance of access has some downsides. The potential expense of doing so is one consideration, although the payment itself is just a wealth transfer among taxpayers that may or may not have political repercussions.\(^ {229}\) We must also be concerned with the administrative costs of calculating and carrying out the payments—"settlement costs" in Frank Michelman’s schema.\(^ {230}\) A deeper problem is that conceding an implicit taking sets a precedent for future actions, which may create a ratchet effect.\(^ {231}\) Paying compensation in a given setting may make it more difficult to later argue that the same or similar interactions should be immunized from takings liability by background principles or some version of an open-door theory.

There may also be an ingrained reluctance on the part of

\(^{227}\) Id. at 2080–81.

\(^{228}\) See Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S., 608–09 (2013) (observing that if there is no consummated bargain and hence no taking, the remedy of just compensation does not apply but the exaction can still amount to an unconstitutional burden to be remedied in accordance with whatever state or federal cause of action the landowner sued under).


\(^{230}\) See Michelman, supra note 143.

governmental entities to pay for takings, pushing them to reflexively withdraw the offending regulation. This, certainly, was Oregon’s experience with Measure 37, which (before it was largely gutted by the subsequent enactment of Measure 49) required compensation for, or waiver of, land use regulations enacted after the owner acquired the land that diminished property values. Almost invariably, the government waived the regulation. Accordingly, we might worry that governments will substitute less effective regulatory measures for ones that rely on physical access in order to avoid having to hemorrhage a constant stream of payments.

Yet challenges may be few and far between if the amounts to be gained are trivial and the government shows no inclination to drop the measure in question—typically, the true goal of the landowner bringing the challenge. Hence, precommitting to paying just compensation, perhaps by setting aside resources earmarked for this purpose, might prove a valuable strategic move. While it is impossible to predict the modal governmental response to Cedar Point, and any generalizations are bound to be wrong in a nation containing tens of thousands of governmental bodies, one interesting question is whether the response to Cedar Point will influence the course of future takings cases. If the Court’s elaborate scrutiny machine turns out to be nothing but a byzantine coin-operated turnstile, further reworkings of the implicit takings escape room may start to seem less appealing.

In sum, stopping off at the cash register under the lighted exit sign to pay just compensation may be a viable option for the government in many contexts. The availability of an often-trivial compensation alternative to the onerous strictures of meeting heightened scrutiny or the social costs of abandoning long-established policies may make Cedar Point less consequential than it initially seems. It also makes it


233. See id. at 1284 (2009) (“In only one claim, out of the over 7000 Measure 37 claims filed, did the state or municipality choose to compensate the property owners rather than waive the regulation.”).

234. Although this option is straightforward for legislative and regulatory acts, the prospect of judicial takings raises additional, difficult remedial questions, as has been well explored elsewhere. See, e.g., D. Benjamin Barros, The Complexities of Judicial Takings, 45 RICH. L. REV. 903, 953–58 (2011); Eduardo M. Peñalver & Lior Jacob Strahilevitz, Judicial Takings or Due Process?, 97 CORNELL L. REV. 305 (2012); Fennell, supra note 88, at 111–14; Barton H. Thompson, Jr., Judicial Takings, 76 VA. L. REV. 1449, 1513–22 (1990).

235. Although Cedar Point greatly expanded the circumstances in which trivial payments might be due for takings, the phenomenon did not start with that case. See Loretto v.
less clear what the Court was really up to. Perhaps, for at least some members of the majority, the goal was not really to curtail policies like California’s or meaningfully advance the interests of property owners, but rather to strike an expressive, symbolic blow for property rights. The decision is sure to cast a long shadow, but how much it will change life on the ground is less clear.

CONCLUSION

_Cedar Point_, the Court’s new entry in the compendium of implicit takings cases, advances a line of doctrine that applies selective scrutiny to property-impacting laws and regulations. Significantly, the Court does not ratchet up the degree of scrutiny that applies across the board. Rather, it concocts a convoluted set of tests that seem baffling on the surface, but that effectively carve out certain kinds of property regulations to receive low levels of review while others receive intense scrutiny and come at a price premium.

This way of proceeding has its drawbacks, even for the Court. It is conceptually incoherent. It opens up a welter of essentially unanswerable questions about the nature and content of background limits on title, what kinds of door-openings imply what sorts of obligations, what types of bargains do and do not put unacceptable pressure on the right to just compensation, and where the lines surrounding _per se_ categories really fall—the answers to which may carry unintended consequences. And, because takings analysis presupposes legitimate government action for which compensation

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236. Cf. William A. Fischel, _Regulatory Takings_ 61–62 (1995) (suggesting that the property rights victory in _Nollan_ served a similarly symbolic role for pro-development interests notwithstanding the fact that it might actually work to their disadvantage by taking some potential bargains off the table).

237. It may even prove counterproductive to the cause of property rights protection. See Farber, _supra_ note 8 (predicting that the effects of enlarged categorical “background norm” exceptions will outstrip the effects of the Court’s new _per se_ rule in the physical invasion cases); see also Blumm & Ritchie, _supra_ note 89 (describing the unexpected consequences of the development of categorical “background principles” exceptions following _Lucas_). Cf. Timothy M. Mulvaney, _The State of Exactions_, 61 WM. & MARY 169, 173 (2019) (finding, based on reviewing the 130 lower court cases decided post-_Koontz_, “that _Koontz’s_ footprint is thus far rather light”).
serves as full validation, it cannot really give property rights advocates what they most crave, which is the ability to actually stop incursions from happening.

What, then, does the Court understand itself to be doing? Cedar Point might be read as a symbolic blow for property rights, a show of strength in this domain by the new conservative supermajority. Yet the view of property rights it vindicates is far from absolute; it is instead rooted in a tradition of status quo wealth preservation that owes as much to state action as it does to its restraint. The Cedar Point majority likely finds this way of understanding property rights to be natural and straightforward—and if it takes a funhouse full of mirrors and a gauntlet of unanswerable riddles to make the doctrine fit the vision, well, so much the worse for the doctrine.238 Wittingly or not, the Court has created an analytic environment in which every seemingly fixed point of reference offers not a true foothold or useful signpost, but only another nested puzzle. This essay does not purport to have found any of the solutions, but it aims to provoke thought about the point of the puzzle making.

238. See, e.g., Farber, supra note 8 (observing that the Court, through its regulatory takings jurisprudence, “has created a house of mirrors, a maze in which nothing is as it seems”).