AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Property/Takings

**Cedar Point Nursery v. Hassid, 594 U.S. \_\_\_** (2021)

*Cedar Point Nursery employees five-hundred persons to grow strawberries in northern California. California Law required Cedar Point to permit the United Farm Workers, a union of agricultural workers, to enter their property for the purpose of holding union meetings. Cedar Point claimed this access took property in violation of the takings clause of the Fifth Amendment as incorporated by the due process clause of the Fourteenth Amendment. The company sued Victoria Hassid and other members of the California Agricultural Labor Relations Board, asking the court to forbid enforcement of that provision of state labor law. The district court rejected their claim as did the Court of Appeals for the Ninth Circuit. Cedar Point appealed to the Supreme Court of the United States.*

*The Supreme Court by a 6-3 vote reversed the Court of Appeals. Chief Justice John Roberts’ majority opinion held that the California rule was a permanent invasion of property that was a per se taking. Why does Roberts insist that this was a permanent invasion? Why does Justice Breyer insist the invasion was only temporary? What are the stakes in this debate and who has the better of the argument? Breyer claims and Roberts rejects the notion that this will threaten traditional inspections, such as inspections of restaurants for health hazards? Why does Brewer perceive a threat? Why does Roberts disagree? Who has the better of this argument? Roberts claims that there was no public benefit in this regulation. Is this correct? Is this the court insisting the state be neutral toward unions and employers, or is the court taking the side of the employers against a public interest in union representation?*

Chief Justice [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default)&analyticGuid=Iab37444ed36711eb9531b93dba0730fb) delivered the opinion of the Court.

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When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. . . . The government commits a physical taking when it uses its power of eminent domain to formally condemn property. The same is true when the government physically takes possession of property without acquiring title to it. And the government likewise effects a physical taking when it occupies property—say, by recurring flooding as a result of building a dam. These sorts of physical appropriations constitute the “clearest sort of taking,” and we assess them using a simple, *per se* rule: The government must pay for what it takes.

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.  Our jurisprudence governing such use restrictions has developed more recently. Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property. In *Pennsylvania Coal Co. v. Mahon* (1922), however, the Court established the proposition that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” . . . To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in [*Penn Central*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978139503&pubNum=0000780&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default)), balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.

Our cases have often described use restrictions that go “too far” as “regulatory takings.” But that label can mislead. Government action that physically appropriates property is no less a physical taking because it arises from a regulation. . . . The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and [*Penn Central*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978139503&pubNum=0000780&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default)) has no place.

The access regulation appropriates a right to invade the growers’ property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers’ land for three hours per day, 120 days per year. Rather than restraining the growers’ use of their own property, the regulation appropriates for the enjoyment of third parties the owners’ right to exclude.

The right to exclude is “one of the most treasured” rights of property ownership. . . . Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement. . . . [G]overnment-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation. As in those cases, the government here has appropriated a right of access to the growers’ property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers’ property—to literally “take access,” as the regulation provides.  It is therefore a *per se* physical taking under our precedents. Accordingly, the growers’ complaint states a claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments.

. . . .There is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364. To begin with, we have held that a physical appropriation is a taking whether it is permanent or temporary. Our cases establish that “compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary.” . . . [W]e have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous. . . . .

. . . . [I]t is true that the property rights protected by the Takings Clause are creatures of state law. But no one disputes that, without the access regulation, the growers would have had the right under California law to exclude union organizers from their property. And no one disputes that the access regulation took that right from them. The Board cannot absolve itself of takings liability by appropriating the growers’ right to exclude in a form that is a slight mismatch from state easement law. Under the Constitution, property rights “cannot be so easily manipulated.”

Our decisions consistently reflect this intuitive approach. We have recognized that the government can commit a physical taking either by appropriating property through a condemnation proceeding or by simply “enter[ing] into physical possession of property without authority of a court order.”  In the latter situation, the government's intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold. Yet we recognize a physical taking all the same. Any other result would allow the government to appropriate private property without just compensation so long as it avoids formal condemnation. . . .

. . . . Unlike the growers’ properties, the PruneYard was open to the public, welcoming some 25,000 patrons a day. Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public.

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. . . . In “ordinary English” “appropriation” means “*taking*as one's own,” and the regulation expressly grants to labor organizers the “right to *take*access.  We cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a “fundamental element of the property right that cannot be balanced away. Our cases establish that appropriations of a right to invade are *per se*physical takings, not use restrictions subject to [*Penn Central*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978139503&pubNum=0000780&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default)): “[W]hen [government] planes use private airspace to approach a government airport, [the government] is required to pay for that share no matter how small.” . . . With regard to the complexities of modern society, we think they only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained.

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[O]our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. This basic distinction is firmly grounded in our precedent. . . . .

. . . . [M]any government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights. . . . . These background limitations also encompass traditional common law privileges to access private property. . . . .

*Third*, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. . . . Under this framework, government health and safety inspection regimes will generally not constitute takings. When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy.

None of these considerations undermine our determination that the access regulation here gives rise to a *per se* physical taking. Unlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers’ land. Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises. And unlike standard health and safety inspections, the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public. . . .

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Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default)&analyticGuid=Iab37444ed36711eb9531b93dba0730fb), concurring.

[omitted]

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default)&analyticGuid=Iab37444ed36711eb9531b93dba0730fb), with whom Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default)&analyticGuid=Iab37444ed36711eb9531b93dba0730fb) and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default)&analyticGuid=Iab37444ed36711eb9531b93dba0730fb) join, dissenting.

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Does the regulation *physically appropriate* the employers’ property? If so, there is no need to look further; the Government must pay the employers “just compensation.” Or does the regulation simply *regulate* the employers’ property rights? If so, then there is every need to look further; the government need pay the employers “just compensation” only if the regulation “goes too far.”

. . . . [T]his regulation does not “appropriate” anything; it regulates the employers’ right to exclude others. At the same time, our prior cases make clear that the regulation before us allows only a *temporary*invasion of a landowner's property and that this kind of temporary invasion amounts to a taking only if it goes “too far.” . . .

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Initially it may help to look at the legal problem—a problem of characterization—through the lens of ordinary English. The word “regulation” rather than “appropriation” fits this provision in both label and substance. It is contained in Title 8 of the California Code of Regulations. It was adopted by a state regulatory board, namely, the California Agricultural Labor Relations Board, in 1975. . . . At the same time, the provision only awkwardly fits the terms “physical taking” and “physical appropriation.” The “access” that it grants union organizers does not amount to any traditional property interest in land. It does not, for example, take from the employers, or provide to the organizers, any freehold estate (*e.g.*, a fee simple, fee tail, or life estate); any concurrent estate (*e.g.*, a joint tenancy, tenancy in common, or tenancy by the entirety); or any leasehold estate (*e.g.*, a term of years, periodic tenancy, or tenancy at will). . . . .

The regulation does not *appropriate* anything. It does not take from the owners a right to invade (whatever that might mean). It does not give the union organizations the right to exclude anyone. It does not give the government the right to exclude anyone. What does it do? It gives union organizers the right temporarily to invade a portion of the property owners’ land. It thereby limits the landowners’ right to exclude certain others. The regulation *regulates*(but does not *appropriate*) the owners’ right to exclude.

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As these cases have used the terms, the regulation here at issue provides access that is “temporary,” not “permanent.” . . . [I]t does not place a “fixed structure on land or real property.”  The employers are not “forever denie[d]” “any power to control the use” of any particular portion of their property.  And it does not totally reduce the value of any section of the property. . . . [T]he public cannot walk over the land whenever it wishes; rather a subset of the public may enter a portion of the land three hours per day for four months per year (about 4% of the time).

At the same time, *[PruneYard](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980116765&pubNum=0000780&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default))* *Shopping Center v. Robins’* (1980) holding that the taking was “temporary” (and hence not a *per se* taking) fits this case almost perfectly. . . . The regulation before us grants a far smaller group of people the right to enter landowners’ property for far more limited times in order to speak about a specific subject. Employers have more power to control entry by setting work hours, lunch hours, and places of gathering. On the other hand, as the majority notes, the shopping center in *[PruneYard](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980116765&pubNum=0000780&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default))*was open to the public generally. All these factors, however, are the stuff of which regulatory-balancing, not absolute *per se*, rules are made.

Our cases have recognized, as the majority says, that the right to exclude is a “ ‘fundamental element of the property right.’ ”  For that reason, “[a] ‘taking’ may *more readily* be found when the interference with property can be characterized as a physical invasion by government.”  But a taking is not inevitably found just because the interference with property can be characterized as a physical invasion by the government, or, in other words, when it affects the right to exclude.

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. . . . Rather here we have a right that does not allow access at any time. It allows access only from “time to time.” And that makes all the difference. A right to enter my woods whenever you wish is a right to use that property permanently, even if you exercise that right only on occasion. A right to enter my woods only on certain occasions is not a right to use the woods permanently. In the first case one might reasonably use the term *per se* taking. It is as if my woods are yours. In the second case it is a taking only if the regulation allowing it goes “too far,” considering the factors we have laid out in [*Penn Central*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978139503&pubNum=0000780&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default)). That is what our cases say.

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The persistence of the permanent/temporary distinction that I have described is not surprising. That distinction serves an important purpose. We live together in communities. Modern life in these communities requires different kinds of regulation. Some, perhaps many, forms of regulation require access to private property (for government officials or others) for different reasons and for varying periods of time. Most such temporary-entry regulations do not go “too far.” And it is impractical to compensate every property owner for any brief use of their land. . . . Consider the large numbers of ordinary regulations in a host of different fields that, for a variety of purposes, permit temporary entry onto (or an “invasion of ”) a property owner's land. They include activities ranging from examination of food products to inspections for compliance with preschool licensing requirements.

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. . . . How is an “isolated physical invasion” different from a “temporary” invasion, sufficient under present law to invoke [*Penn Central*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978139503&pubNum=0000780&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default))? And where should one draw the line between trespass and takings? Imagine a school bus that stops to allow public school children to picnic on private land. Do three stops a year place the stops outside the exception? One stop every week? Buses from one school? From every school? Under current law a court would know what question to ask. The stops are temporary; no one assumes a permanent right to stop; thus the court will ask whether the school district has gone “too far.” Under the majority's approach, the court must answer a new question (apparently about what counts as “isolated”).

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I recognize that the Court's prior cases in this area are not easy to apply. Moreover, words such as “temporary,” “permanent,” or “too far” do not define themselves. But I do not believe that the Court has made matters clearer or better. Rather than adopt a new broad rule and indeterminate exceptions, I would stick with the approach that I believe the Court's case law sets forth. “Better the devil we know ....” A right of access such as the right at issue here, a nonpermanent right, is not automatically a “taking.” It is a regulation that falls within the scope of [*Penn Central*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978139503&pubNum=0000780&originatingDoc=Iab37444ed36711eb9531b93dba0730fb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=f61168d3afed4342b7e035794ad09fab&contextData=(sc.Default)). Because the Court takes a different view, I respectfully dissent.