

CEDAR POINT NURSERY: TAKING AN UNPRECEDENTED APPROACH TO THE RIGHT TO EXCLUDE

Abstract: In 2021, in *Cedar Point Nursery v. Hassid*, the United States Supreme Court reshaped the importance of exclusion rights by deeming such rights to be the critical aspect of private property ownership. Consequently, the Court determined that any infringement upon this core exclusion right must automatically be a taking under the Fifth Amendment. This Note examines the development of judicial doctrine surrounding the Takings Clause and the basis for placing a significant value on the right to exclude. The Note then analyzes the *Cedar Point* decision and how the Court relied on precedent from the early twentieth century in *Portsmouth Harbor Land & Hotel Co. v. United States (Portsmouth II)*. In *Cedar Point*, the Court ignored its prior holding in *Portsmouth II*, which focused on the government's intent. Instead, the majority used *Portsmouth II* as justification for the holding that invasions and infringements on the right to exclude were the core factors in determining the existence of a per se taking. This Note argues that the reliance on prior cases for justification in expanding the per se takings category was misplaced, resulting in harmful limitations on necessary governmental regulation.

INTRODUCTION

In 2015, union representatives from the United Farm Workers of America (United Farm Workers) attempted to speak with agricultural workers on two different farms in California, Cedar Point Nursery and Fowler Packing Company.¹ Both farms employed many agricultural workers, some of whom were seasonal laborers, and produced fruit for commercial sale.² Cedar Point Nurse-

¹ See Complaint for Declaratory and Injunctive Relief at 2, 5–7, *Cedar Point Nursery v. Gould*, No. 16-cv-00185, 2016 WL 3549408 (E.D. Cal. Feb. 10, 2016) [hereinafter Complaint] *aff'd sub nom.* *Cedar Point Nursery v. Shiroma*, 923 F.3d 524 (9th Cir. 2019), *rev'd and remanded sub nom.* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (presenting the plaintiff's combined complaint after union representatives attempted to access their agricultural property to meet with their employees).

² See *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 528–29 (9th Cir. 2019) (detailing how Cedar Point Nursery had around 500 workers, 400 of whom were seasonal workers who stayed in hotels in Oregon while working for Cedar Point Nursery), *rev'd sub nom.* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 139 (2021). Fowler Packing Company employed even more workers, with up to 2,500 field workers and an additional 500 packing facility workers. See *id.* (observing how Fowler Packing Company was engaged in an extensive farming operation that employed thousands of workers, none of whom actually lived on the premises of the company).

ry grew and sold strawberries, whereas Fowler Packing Company produced large quantities of grapes and citrus fruits.³

In 1975, the California state government enacted the California Agricultural Labor Relations Act (ALRA) to provide California agricultural workers with statutory rights and protections.⁴ A key motivation in enacting the ALRA was to expand upon federal statutory protections for unionizing employees.⁵ Whereas federal law focused on codifying employee rights in an effort to protect interstate commerce, the ALRA was primarily focused on advancing agricultural worker's rights by establishing their collective bargaining and unionization rights.⁶

³ See *id.* (noting how both farms were engaged in commercial farm operations, with Cedar Point Nursery growing strawberries and selling them to producers and Fowler Packing Company similarly producing considerable amounts of grapes and citrus fruits for shipment). Notably, both companies contended in their initial complaints against the union workers accessing their property that they were ethical and treated their employees well, which suggested a reason for their resistance to union organization. See Complaint, *supra* note 1, at 5–6 (presenting accounts of how Cedar Point Nursery and Fowler Packing Company provided benefits and positive working conditions for their employees, including high compensation, provision of meals, and adequate living conditions).

⁴ See CAL. LAB. CODE § 1140.2 (West 2024) (enacting the ALRA in response to a need to protect agricultural workers' labor rights, particularly regarding unionization and collective bargaining); see also CAL. AGRIC. LAB. RELS. BD., FIRST ANNUAL REPORT OF THE AGRICULTURAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED JUNE 30, 1976 AND JUNE 30, 1977, at 1–2 (1977) (explaining how the state's purpose in enacting the ALRA in 1975 was to implement the state's policy initiative of protecting both agricultural workers and their unions by establishing statutory labor protections for such individuals and entities).

⁵ See Tracy E. Sagle, Comment, *The ALRB—Twenty Years Later*, 8 SAN JOAQUIN AGRIC. L. REV. 139, 142 (1998) (noting how California, similar to a select number of other states, enacted legislation to protect agricultural workers because of the lack of protections for those workers from national legislation). Prior to the ALRA, in 1935, the United States Congress enacted the National Labor Relations Act (NLRA), which provided statutory protections for employees seeking to unionize. See generally 29 U.S.C. § 151; see also *About NLRB*, NLRB, <https://www.nlr.gov/about-nlr/b/rights-we-protect/the-law#:~:text=National%20Labor%20Relations%20Act&text=The%20NLRA%20protects%20workplace%20democracy,representation%20without%20fear%20of%20retaliation> [https://perma.cc/6ASR-UTM3] (describing how Congress created the NLRA to promote workers' agency in their ability to unionize and advocate for their rights in workplace settings). Critically, the NLRA extended to private sector employees and allowed them to unionize and seek out labor associations to better enhance their working conditions and bargaining power with their employers. See *National Labor Relations Act (1935)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/national-labor-relations-act> [https://perma.cc/85EB-CY4Z] (explaining how Congress passed the NLRA to promote organized labor and improve worker protections by encouraging unionization and collective bargaining but observing how the NLRA excluded certain employers from its scope, including agricultural employers).

⁶ See Sagle, *supra* note 5, at 145–46 (explaining that a fundamental difference between the NLRA and ALRA was that the NLRA sought to protect commerce and economic relations between states, by which bargaining rights were the necessary way to provide this protection, whereas the ALRA focused on protecting workers by providing bargaining rights, regardless of the economic impact of this protection). Although the NLRA was an impactful statute promoting unionization rights, it was limited in scope because it excluded agricultural workers from its protections. See *id.* at 141 n.8 (explaining how many agricultural workers are not statutorily considered employees and therefore were excluded from the collective bargaining and unionization protections of the NLRA). The NLRA created

In 1975 the California state government created the Agricultural Labor Relations Board (ALRB) to oversee and enforce the provisions of the ALRA.⁷ The ALRB took a critical step when it enacted an access regulation, which permitted union organizers to enter agricultural property to provide organizers with access to agricultural workers, thereby increasing the collective bargaining power of agricultural workers.⁸ The regulation allowed union representatives to temporarily enter property to inform the workers of their right to unionize and collectively bargain under California state law.⁹ At the time of the regulation's enactment, many agricultural laborers were migrant workers, so the access regulation provided an important mechanism for union organizers to reach those workers.¹⁰

Owners of agricultural property resisted the access regulation in part because of a perception that it interfered with critical property rights, namely the

delineations between different types of agricultural workers, extending its protections to certain groups, but nonetheless, the NLRA did not protect many types of agricultural workers in California. *See id.* at 140–41 (detailing how the Supreme Court delineated between primary and secondary agricultural workers, but noting that both definitions still excluded many of the agricultural workers in California (citing *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762–63 (1949))); *see also* Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 490–91 (1999) (explaining that Congress excluded agricultural workers from the NLRA based on a perception that agricultural work was smaller and more familial than industrial work, and therefore did not need the same level of federal statutory protections).

⁷ *See* Sagle, *supra* note 5, at 144 (detailing how the California state government created an agency, the ALRB, to interpret the ALRA and adjudicate any issues that arose related to the statute); *see also* *Who We Are*, AGRIC. LAB. RELS. BD., <https://www.alrb.ca.gov/about-us/who-we-are/> [<https://perma.cc/LDH2-X3JK>] (noting how the ALRB is tasked with the responsibility of protecting agricultural workers in California).

⁸ *See* CAL. CODE. REGS. tit. 8, § 20900(e)(1)(C) (2020) (permitting union organizers to go onto agricultural property within certain constraints in order to gain union support from agricultural workers), *invalidated by* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 139 (2021); *see also* Sagle, *supra* note 5, at 143 (detailing how union representatives must be able to enter agricultural property to promote unionization and collective bargaining rights because unlike in industrial workplaces, unions do not have multiple methods of communicating with agricultural workers, many of whom reside at their workplace).

⁹ *See* CAL. CODE. REGS. tit. 8 § 20900(e)(1)(C) (2020) (establishing union access onto agricultural property through the ALRA with several limitations on such access, including prescribing how long union organizers could enter the property and requiring advance written notice).

¹⁰ *See* Philip Martin & Bert Mason, *California's ALRA and ALRB After 40 Years*, ARE UPDATE, Mar./Apr. 2017, at 9, 9, https://s.giannini.ucop.edu/uploads/giannini_public/e7/19/e719e080-1b02-4871-8eb7-85cbc88f0b0c/v20n4_3.pdf [<https://perma.cc/BHF9-DMNB>] (observing the importance of union access rights because many agricultural workers were migrants who resided at their place of employment, meaning that access to these workers was critical in ensuring unions could inform these workers of their rights). Property owners in California resisted the access regulations, claiming that the state granting union officials access to their property would interfere with their property rights. *See id.* at 9–10 (detailing how the ALRB declined to adopt the property owners' argument and instead determined that the union organizers' need to access agricultural workers, many of whom were migrant workers, superseded the owners' private property rights).

right to exclude.¹¹ The resistance to this regulation demonstrated the tension between private property rights, including exclusion rights, and the government's need to effectively regulate.¹² In 2015, a challenge to the union access regulation instigated a profound change to the Supreme Court's interpretation of the Takings Clause.¹³

First, in the summer of 2015, union representatives unsuccessfully tried to enter Fowler Packing Company on three separate occasions in attempts to interact with the company's workers prior to a union election.¹⁴ Union organizers infrequently attempted to access private agricultural properties, including Fowler Packing Company, and only did so in minimally disruptive manners.¹⁵ Nevertheless, Fowler Packing Company resisted this attempted entry and pro-

¹¹ See Sagle, *supra* note 5, at 149 (observing how agricultural property owners were resistant to the access rule because they feared that union organizers entering property would be disruptive to their businesses, which caused the government to implement restrictions to access); see also *Agric. Lab. Rels. Bd. v. Superior Ct.*, 546 P.2d 687, 696, 698 (Cal. 1976) (upholding the access regulation on the basis that exclusion rights had to be set aside when union organizers had no other way to reach agricultural employees).

¹² See *Agric. Lab. Rels. Bd.*, 546 P.2d at 693–94 (showing the tension between individual property rights and the government's need to promote the public good through regulation); see also Brief Amici Curiae of Virginia and Colorado et al. in Support of Respondents at 3–4, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107), 2021 WL 679091 [hereinafter Brief of Virginia] (highlighting the importance of the ability of states and their representatives to enter and inspect property for protecting public health and safety).

¹³ See Complaint, *supra* note 1, at 8 (detailing the plaintiffs' argument that the access regulation unconstitutionally eliminated a core property right away).

¹⁴ See Brief for United Farm Workers of America as Amicus Curiae in Support of Respondents at 6, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107), 2021 WL 640498 [hereinafter Brief for United Farm Workers] (explaining the nature of union organization and election campaigns by detailing how union organizers only entered, or attempted to enter, the agricultural properties in this case prior to a union election). At Fowler Packing Company, the property owners prohibited the union organizers from entering their property. See *id.* at 7–8 (noting the difference between permanent and temporary entry onto private property and observing that at Fowler Packing Company, neither type of entry actually occurred).

¹⁵ See *id.* at 6 (observing how the union representatives only tried entering Fowler Packing Company in the limited circumstance of an impending union election). Union representatives exercised their right under the regulations to enter agricultural property relatively infrequently. See *id.* at 15 (highlighting the fact that in the time since the union representatives attempted to go onto the packing company's property in 2015, they have not made any subsequent attempts to enter). Furthermore, the limited use of the access regulation extended to other farms. See *id.* at 15–16 (arguing that overall, union representatives use the California state regulation permitting access onto agricultural property in limited and infrequent circumstances, almost always prior to an election and only during busier points of the agricultural season); see also Sagle, *supra* note 5, at 148–49 (observing how California authorized union access onto agricultural property to improve a union's ability to reach agricultural workers, but that the access regulation had significant limitations to minimize disruption to growers, including limits on the number of union organizers allowed on agricultural property and time parameters for union access in order to protect growers from significant disruption).

hibited the union representatives from entering their property, thereby denying them the opportunity to speak with the agricultural workers.¹⁶

Likewise, in October of 2015, members of the United Farm Workers went onto the property of Cedar Point Nursery in the early morning to meet with the nursery's workers.¹⁷ Unlike the attempt at Fowler Packing Company, the union representatives were able to enter Cedar Point Nursery and reach the nursery's workers, many of whom were seasonal workers.¹⁸ At Cedar Point Nursery, union representatives went onto the property early in the morning to meet with workers, some of whom joined the union in protest.¹⁹ Nevertheless, the nursery ultimately did not suffer considerable damage or disruption to its operations.²⁰

Although these two instances of union organization seemingly caused minimal disruption to the agricultural property owners, they were profoundly impactful in forming the foundation of a constitutional challenge to access regulations under the Takings Clause of the Fifth Amendment.²¹ In 2021, in

¹⁶ See Complaint, *supra* note 1, at 7 (demonstrating that Fowler Packing Company denied the union organizers permission to enter their property, despite their authority to do so); see also *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 529 (9th Cir. 2019) (observing that Fowler Packing Company resisted the union organizers' efforts to speak to its workers on company premises during working hours by highlighting the company's statement that the union could access its workers outside of their work at the company), *rev'd sub nom. Cedar Point*, 141 S. Ct. 2063.

¹⁷ See *Cedar Point*, 923 F.3d at 528–29 (detailing how the owners of Cedar Point Nursery were frustrated by union representatives going onto their property around five o'clock in the morning). According to Cedar Point Nursery, the union representatives allegedly failed to adhere to the stipulations of the access regulation, such as neglecting to provide the nursery advance written notice that representatives would be coming onto the property. See *id.* (noting that the union representatives allegedly only provided Cedar Point Nursery with the requisite notice after they entered the private property, in violation of the access regulation).

¹⁸ See Complaint, *supra* note 1, at 5–6 (detailing how the majority of workers at Cedar Point Nursery were seasonal and resided in temporary housing at a hotel in Oregon). In addition to the seasonal workers, the nursery employed around one-hundred full-time individuals. See *id.* at 5 (noting that regardless of an individual's seasonal or full-time employment status, none of the workers actually lived on Cedar Point Nursery premises).

¹⁹ See *id.* at 6 (highlighting how some Cedar Point Nursery workers temporarily stopped working to join the United Farm Workers union protest). The United Farm Workers representatives went onto the property early in the morning and were allegedly disruptive to the farm's operations. See *Cedar Point*, 923 F.3d at 529 (detailing how union representatives went onto the nursery's property at five o'clock in the morning and allegedly yelled and used bullhorns to entice farm workers to leave their work and join the union's campaign).

²⁰ See Complaint, *supra* note 1, at 6 (noting that despite the union representative's campaign and entry onto Cedar Point Nursery, the farm still retained most of its workers during the protest); see also Brief for United Farm Workers, *supra* note 14, at 15–16 (arguing that the farmers failed to demonstrate how California's access regulation impeded upon their ability to use and enjoy their property).

²¹ See U.S. CONST. amend. V (prohibiting the federal government from taking away private property without providing appropriate compensation); see also Complaint, *supra* note 1, at 6 (highlighting the minimal disruption to the farm owners resulting from the access regulation, including the absence of a meaningful reduction in workforce); see also *Cedar Point*, 141 S. Ct. at 2074 (determining that California's access regulation unconstitutionally deprived the farms of their property rights by taking away exclusion rights).

Cedar Point Nursery v. Hassid, the United States Supreme Court held that because the access regulation interfered with a property owner's ability to exclude others from their property, there was a taking of private property.²² Part I of this Note explores the judicial development of the right to exclude.²³ Part II analyzes how the Supreme Court's recent decision in *Cedar Point* alters the importance of the right to exclude in determining the presence of a taking.²⁴ Part III argues that the Supreme Court's holding in *Cedar Point* incorrectly relies on its precedent in a prior decision from 1922, *Portsmouth Harbor Land & Hotel Co. v. United States (Portsmouth II)*, where the United States Supreme Court held that property entry property could only be a per se taking if the government demonstrated intent to acquire possession of the land.²⁵

I. JUDICIAL DEVELOPMENT OF THE RIGHT TO EXCLUDE

The Takings Clause of the Fifth Amendment of the United States Constitution prohibits the federal government from acquiring private property for public use without providing property owners with adequate compensation.²⁶ Historically, courts strictly interpreted the Takings Clause to only apply where the government actually invaded and occupied private land.²⁷ Over time, this strict perception of takings expanded, and courts determined that governmental actions could be takings, even in the absence of an actual physical taking of

²² See *Cedar Point*, 141 S. Ct. at 2076 (determining that a governmental taking of exclusion rights, even via regulatory action, was a per se taking).

²³ See *infra* notes 26–123 and accompanying text.

²⁴ See *infra* notes 124–172 and accompanying text.

²⁵ See *infra* notes 173–204 and accompanying text.

²⁶ See U.S. CONST. amend. V (creating a constitutional requirement for the government to properly compensate individuals when the government takes property for public use or benefit); see also *Cedar Point*, 141 S. Ct. at 2071 (observing how property ownership is a fundamental component of national values, such as encouraging individual freedom (citing *Murr v. Wisconsin*, 592 U.S. 383, 393–94 (2017))). The Supreme Court viewed private property ownership as a unique mechanism for individuals to have autonomy and separation from the government. See *Cedar Point*, 141 S. Ct. at 2071 (explaining the precedent of how the Court supported and reinforced the historically rooted idea that private property ownership was a core component of individuality (citing John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 223, 280 (Charles C. Little & James Brown eds., Cambridge, Bolles & Houghton 1851))).

²⁷ U.S. CONST. amend. V; see Leif Wenar, *The Concept of Property and the Takings Clause*, 97 COLUM. L. REV. 1923, 1925–26 (1997) (detailing the historical application of the Takings Clause, where the Court only considered governmental action to be a taking when the government actually acquired ownership of an individual's physical property (citing *Mugler v. Kansas*, 123 U.S. 623, 671 (1887))). Notably, the Supreme Court's longstanding position was that government takings only occurred where the government acquired physical possession of property. See Wenar, *supra*, at 1926 (demonstrating that the Supreme Court determined there was no taking in *Mugler* because the government merely regulated usage of property and did not actually acquire the property, which only then could have been a taking).

property.²⁸ In 2021, in *Cedar Point*, the United States Supreme Court significantly expanded the takings framework by holding that infringement upon certain property rights could be a taking.²⁹

Section A of this Part examines the foundations of property ownership and the Takings Clause.³⁰ Section B focuses on two pivotal takings cases from the early twentieth century, *Peabody v. United States* and *Portsmouth II*.³¹ Section C analyzes the development of jurisprudence surrounding the Takings Clause.³² Section D reviews the United States Supreme Court's recent decision in *Cedar Point* and its reliance on the Court's decision in *Portsmouth II*, as well as the dissent's critique of this reliance.³³

A. Foundations of Property Law

Society has historically viewed property ownership as a key individual right because it enables individuals to exercise freedom by retreating to privately owned land.³⁴ The deeply established importance of the right to exclude has been viewed as fundamental to property ownership.³⁵ Contemporary property law characterizes property ownership as the possession of certain property rights, akin to a “bundles of rights,” which is inclusive of key property rights such as the right to use and devise property.³⁶ Courts have affirmed the im-

²⁸ See Wenar, *supra* note 27, at 1926–27 (observing that the understanding of property ownership shifted from possession of physical items, such as land, to a more nuanced view that property ownership was the possession of property rights over such physical items). Thus, a viewpoint emerged that property ownership was better understood as a right instead of possession of a physical item. See *id.* at 1927–28 (observing how legal scholar Wesley Newcomb Hohfeld's articulation of property rights more adequately addressed how property is viewed through the bundle of sticks model); see, e.g., Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 42–43 (1964) (observing how the Supreme Court began to shift its perception of which governmental actions were takings based on a decrease in property value from governmental action, signaling the Supreme Court's new willingness to review a broader set of governmental actions under the takings framework (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962))).

²⁹ See *Cedar Point*, 141 S. Ct. at 2080 (determining that governmental appropriation of an individual's core property right of exclusion amounted to a per se taking).

³⁰ See *infra* notes 34–47 and accompanying text.

³¹ See *infra* notes 48–87 and accompanying text.

³² See *infra* notes 88–105 and accompanying text.

³³ See *infra* notes 106–123 and accompanying text.

³⁴ See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1352–53 (1993) (observing how key historical figures such as Thomas Jefferson understood private property ownership to be the core element of individual freedom because it allowed for enjoyment of individual freedoms by retreating to secluded land, thereby enabling individuals to seclude themselves from state officials).

³⁵ See Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEGAL EDUC. 539, 539 (2006) (presenting William Blackstone's depiction of the critical importance of exclusion rights in property ownership as the “‘sole and despotic dominion’ over the *res*, to the ‘total exclusion of the right of any other individual in the universe’” (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *2)).

³⁶ See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 738 (1998) (observing that the nominalist viewpoint of property ownership as a “bundle of rights” has become the

portance of the “bundle of rights” understanding of property law and placed a particular emphasis on one “right”—the ability to exclude.³⁷

Furthermore, property scholarship has explored the importance of exclusion rights in property ownership.³⁸ The historic and more conservative approach views the right to exclude as the foundation of property ownership.³⁹ Consequently, courts are more likely to view governmental infringements upon an individual’s exclusion rights as takings.⁴⁰ Conversely, more modern understandings of property ownership view exclusion rights as only one component of property ownership—one of the “rights” in the bundle.⁴¹

The Takings Clause of the Fifth Amendment aims to protect these core private property rights by prohibiting the federal government from taking an individual’s property without providing proper compensation to the owner.⁴²

predominant understanding of what constitutes property rights and ownership; *see also* Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 886–88 (2013) (using the terms “bundle of sticks” and “bundle of rights” interchangeably).

³⁷ *See* Merrill, *supra* note 36, at 740–41 (detailing how there are important property rights, including the ability to use and devise property, but arguing that the ability to exclude is the central right, upon which other property rights are dependent).

³⁸ *See, e.g.,* Anderson, *supra* note 35, at 541 (exploring the importance of the ability to exclude in American property law (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))).

³⁹ *See* Merrill, *supra* note 36, at 735 (observing how under the single-variable essentialism construction of property rights, the right to exclude is the core and necessary factor in determining property ownership); *see also* Elizabeth M. Glazer, Response, *Rule of (Out)Law: Property’s Contingent Right to Exclude*, 156 U. PA. L. REV. PENUMBRA 331, 332 (2008), <http://www.pennumbra.com/responses/01-2008/Glazer.pdf>. [<https://perma.cc/9XQY-43S8>] (noting that property scholars and courts historically viewed the right to exclude with greater deference as compared to other property rights); Ellickson, *supra* note 34, at 1322 (noting how private property is defined as property that confines access and usage to a limited set of individuals; otherwise, such property is public).

⁴⁰ *See* Merrill, *supra* note 36, at 735 (demonstrating that courts have viewed infringing upon exclusion rights as akin to violations of the Takings Clause because the government failed to compensate property owners for taking that fundamental property right).

⁴¹ *See id.* at 737–38 (presenting the modern property viewpoint of nominalism, which Thomas Merrill argues is an approach where property does not have a standard definition and can be conformed to different legal principles). Merrill argued that under this modern understanding of property ownership, the right to exclude is no longer the only factor in defining property ownership rights. *See id.* (noting how the Supreme Court adopted a nominalist view of property by applying the bundle of rights framework to property law); *see also* Glazer, *supra* note 39, at 339, 341 (arguing that traditional understandings of the importance of the ability to exclude place too much emphasis on the absoluteness of this one particular right and noting the existence of judicially created exceptions to the right (citing *State v. Shack*, 277 A.2d 369, 370 (N.J. 1971))).

⁴² *See* U.S. CONST. amend. V (requiring the government to adequately compensate property owners when they take property); U.S. CONST. amend. XIV, § 1 (stating that state governments cannot take certain rights without providing due process); Julia K. Bramley, Note, *Supreme Foresight: Judicial Takings, Regulatory Takings, and the Public Trust Doctrine*, 38 B.C. ENV’T AFFS. L. REV. 445, 450 (2011) (observing that although the government has latitude to regulate, if its actions are too restrictive on rights falling within the classic “bundle of rights,” those regulations can be takings (quoting *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987))); *see also* *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (incorporating the Fourteenth Amendment’s Due Process Clause to apply to state takings, in addition to its application to federal government tak-

The purpose of the Takings Clause is to ensure that individual property owners are not forced to endure excessive burdens by subjecting their property to public use without proper compensation when the burden should be shifted to the general public.⁴³

The government originally needed to have physically entered private land on a permanent basis in order for governmental actions to amount to a taking under the Fifth Amendment.⁴⁴ The early standard for evaluating takings claims primarily analyzed whether the character of the government's action was a physical intrusion, regardless of the extent of damage.⁴⁵ Nevertheless, this limited application of the Takings Clause enabled the government to take advantage of private property for public benefit without technically invading the property.⁴⁶ Therefore, challenges brought to such actions under the Takings

ings of private land); Lee Ivy, Note, *The 1986 Term "Takings" Clause Cases: A Unified Approach to Regulatory Takings?*, 13 OKLA. CITY U. L. REV. 325, 332 (1988) (observing how courts have applied the Takings Clause of the Fifth Amendment to state action through the Fourteenth Amendment via its Due Process Clause).

⁴³ See Bramley, *supra* note 42, at 447 (explaining that the government has the ability to take individual property for public benefit but must adequately compensate those property owners to avoid placing an unfair public burden on individual private property owners (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978))).

⁴⁴ See, e.g., *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1872) (limiting the decision to determining that takings exist where there were physical invasions of property); see also Randall J. Pick, Note, *Loretto v. Teleprompter: A Restatement of the Per Se Physical Invasion Test for Takings*, 35 BAYLOR L. REV. 373, 373–74 (1983) (observing how the Court in the late nineteenth century required the government to actually enter private property in order for there to be a taking that triggered the government to compensate landowners (citing *Pumpelly*, 80 U.S. (13 Wall.) at 181)). In instances where the government did not permanently enter property, courts were unwilling to determine property owners were entitled to relief under the Takings Clause. See Pick, *supra*, at 375 (observing how the Court was originally unwilling to view governmental regulations as takings under the Fifth Amendment because there was no permanent, consistent occupation of private property (citing *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879))); see also WILLIAM MICHAEL TREANOR, ENV'T POL'Y PROJECT, THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE (2010), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1001&context=gelpi_papers [<https://perma.cc/46UL-F3EF>] (observing that up to the late 1800s, courts originally interpreted the Takings Clause to only apply to actual acquisition of private land and did not consider regulation of property to amount to a taking, despite the historic presence of many regulations on using property for business and maintaining aesthetics, among others). William Treanor argued that the text of the Fifth Amendment's Taking Clause was limited to actual acquisition of property because of countervailing governmental interests, such as the government's need to be able to use property and regulate it for public benefit. See TREANOR, *supra* (observing how the prevailing republicanism viewpoint of property and the role of the government spurred the Founders to craft a textually narrow Takings Clause).

⁴⁵ See Pick, *supra* note 44, at 374 (observing that the Supreme Court clarified that the physical invasion requirement for a taking looked at the nature of the action, not the precise amount of actual damage suffered, to determine whether a taking occurred (citing *United States v. Cress*, 243 U.S. 316, 384–85 (1917))).

⁴⁶ See Sax, *supra* note 28, at 46–48 (demonstrating that the government used “tricks” to circumvent actually invading property, thereby avoiding triggering the compensation requirement, by using alternative methods such as using zoning and regulations to use private property for their desired use (citing *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 165–66 (1958))).

Clause failed because the requisite physical invasion was missing, even though the government had used private property for its own benefit.⁴⁷

B. Peabody and Portsmouth I & II: A Framing of the Supreme Court's Early Perception of the Takings Clause

In 1913, in *Peabody v. United States*, the United States Supreme Court held that the federal government's actions did not constitute a taking of private property when they placed guns for military defense purposes on neighboring property and occasionally fired the guns across the property in question.⁴⁸ In 1901, the government created a military battery fort, Fort Foster, to protect the Portsmouth Harbor in Maine following the Spanish-American War.⁴⁹ In *Peabody*, the plaintiffs were collectively a landowner, mortgagee, and grantee of property that was located in between Fort Foster and the Portsmouth Harbor.⁵⁰ The property owners primarily used the land as a summer resort and adapted the property to include valuable amenities, including a hotel and cottage, in addition to recreational facilities.⁵¹

In 1902, as part of two defense exercises, the United States government fired the guns placed at Fort Foster across the Portsmouth property on two different occasions in 1902.⁵² Although the government could have fired the guns in a different path to avoid the Portsmouth property, the Court concluded that it

⁴⁷ See *id.* (showing how in the absence of governmental invasion, courts were originally unwilling to find that there were takings, even if the plaintiff lost critical property rights, particularly the right and ability to use their land).

⁴⁸ See 231 U.S. 530, 540 (1913) (reasoning that the government only discharged the guns on two separate occasions and did not have the proper intent to take the private property).

⁴⁹ See *id.* at 535–36 (detailing how the U.S. government created Fort Foster to protect Portsmouth Harbor, with construction beginning in 1873 and concluding in 1901). Fort Foster had five artillery guns and the government resumed and completed construction of the fort after the Spanish-American War. *Id.*; see also KITTERY PARKS COMM'N, TOWN OF KITTERY PARKS FIVE YEAR MANAGEMENT PLAN 2018–2023, at 8 (2017), https://www.kitteryme.gov/sites/g/files/vyhlif10031/f/uploads/parks_management_plan_2017_draft.pdf [<https://perma.cc/W4EF-63G9>] (noting how the federal government created Fort Foster after the Spanish-American war in an effort to protect Portsmouth Harbor, neighboring land, and the Portsmouth Naval Shipyard).

⁵⁰ See *Peabody*, 231 U.S. at 535–36 (observing how the plaintiff's property in Portsmouth was along the Atlantic coast and located in between Fort Foster and Portsmouth Harbor, with Fort Foster being to the northwest of the property). Initially, there were three plaintiffs in three separate suits: the owner, the grantee, and the mortgagee. *Id.* The lower court condensed the complaints into one suit. *Id.* at 535.

⁵¹ See *id.* at 536 (observing how the primary economic use for the property was as a summertime hotel and resort).

⁵² See *id.* at 537 (noting how the government shot guns across the plaintiff's Portsmouth property two separate times in 1902 for the purpose of practicing to hit targets in the coastal area). On each of these occasions, the government fired the guns such that the bullets traveled across the Portsmouth property. See *id.* (highlighting how on the first occasion in June of 1902, there was no damage from this practice, but in September of 1902, the same practice caused \$150 in damages to the plaintiff's property in Portsmouth).

was easiest and most practical for the government to have fired across the Portsmouth property.⁵³ The government had not fired the guns on any separate occasions since the practice exercises.⁵⁴ Nevertheless, the hotel on the property suffered economic harm because visitors feared that the government would resume firing the artillery guns, thereby putting them in danger.⁵⁵

The Court held that the government's actions in placing the artillery guns on neighboring property did not constitute a taking of the plaintiff's property.⁵⁶ The Court focused on the government's intent to determine whether their actions could constitute a taking that would require compensation to the property owners.⁵⁷ If the government intended to use the Portsmouth property for public purposes by firing the guns at any time across the property, the Court determined that this action could constitute a taking.⁵⁸ Nevertheless, the Court reasoned that in the present case, the federal government lacked the requisite intent to subordinate the property for the government's benefit because it only fired the guns on a few isolated occasions.⁵⁹ Merely placing a military battery on adjacent property was insufficient to constitute a taking, even if the pres-

⁵³ See *id.* (detailing how the plaintiffs and the government differed on how the government could have best fired the guns for practice). There was a portion of the government's land on Fort Foster that the government could have used to fire guns across without crossing the Portsmouth property. *Id.* Firing across this part of the land, however, posed safety risks, so the Court determined that the safest and most practical way for the government to have fired practice rounds was by firing across the plaintiff's property. *Id.*

⁵⁴ See *id.* (noting how the government ceased using the guns for practice exercises but ensured that the guns were kept up in useful condition).

⁵⁵ See *id.* at 538 (observing how the hotel and cottage on the plaintiff's property lost money in 1903 and 1904 because of the fear that the government would resume firing guns across the hotel's property). As a result of this fear, the plaintiff's land value decreased, and the hotel closed because of this financial difficulty. *Id.*

⁵⁶ See *id.* at 538, 540 (stating that if the government had intended to fire the guns across the plaintiff's property for practice whenever it desired, including during non-war times, then that behavior would constitute a taking, requiring the government to compensate the property owners). The Court noted that if the government used the plaintiff's property to consistently fire guns across, regardless of whether there was an external threat of war, then that could constitute a taking. *Id.* at 539–40. The Court drew a distinction between instances where the government intended to take or use property for public purposes, which would be a taking, and where damage or disruption to the property was merely a consequence of government action, which the Court determined would not constitute a taking. *Id.*

⁵⁷ See *id.* at 538–39 (noting that in order for a plaintiff to succeed in bringing a takings claim against the government, the party needed to successfully present evidence of governmental intent to take their property).

⁵⁸ See *id.* at 538 (offering a hypothetical scenario where the government used Fort Foster to continuously fire guns at will, regardless of whether there was a war). If the federal government used the plaintiff's Portsmouth property for its benefit and subordinated the property for federal government purposes, then that subordination would constitute a taking. *Id.*

⁵⁹ See *id.* at 539–40 (noting that the government did not demonstrate any intent to fire the guns in the future since they had already tested the guns and had other uses for Fort Foster).

ence of the guns instilled fear and a decline in property value.⁶⁰ For governmental actions to constitute a taking, the Court determined that there must be evidence of governmental intent to acquire the property for public use.⁶¹

Likewise, in 1919, in *Portsmouth Harbor Land & Hotel Co. v. United States (Portsmouth I)*, the United States Supreme Court held that the government's periodic and sparse firing of guns across the plaintiff's property did not constitute a taking.⁶² In *Portsmouth I*, the property in question was the same land as in *Peabody*.⁶³ The Court confirmed its prior stance in *Peabody* that the government's actions in sparsely firing guns did not constitute a taking because there was no requisite intent to subject the property to the government's use.⁶⁴ Even though the government fired the guns several times since *Peabody*, the Court determined that there was still insufficient evidence to demonstrate that the government's intent was to subject the Portsmouth property to its own use.⁶⁵

On the other hand, in 1922, in *Portsmouth II*, the United States Supreme Court held that the federal government's actions could amount to a taking of private property if the government had the requisite intent to subordinate the property for governmental use.⁶⁶ In *Portsmouth II*, the Portsmouth landowners sued the federal government again, claiming that they were entitled to com-

⁶⁰ See *id.* at 539 (holding that the government establishing a fort on adjoining property does not inherently constitute a taking, even if there are adverse effects to the adjoining property, including a decline in land value).

⁶¹ See *id.* at 539–40 (narrowly construing the Takings Clause by determining that absent governmental intent to actually acquire private property for public use, mere usage or damages to property that are incidental to governmental usage of private property, including the isolated deployment of guns and subsequent decrease in tourists, does not amount to a taking).

⁶² See *Portsmouth Harbor Land & Hotel Co. v. United States (Portsmouth I)*, 250 U.S. 1, 2 (1919) (confirming that in order to have governmental action constitute a taking, the government must have sufficient intent to subject an individual's property to governmental use and benefit).

⁶³ See *id.* (determining that the claim brought by the plaintiffs in *Portsmouth I* was almost identical to the claim brought in *Peabody*).

⁶⁴ See *id.* (affirming the *Peabody* decision on the same grounds that there was no new evidence of governmental intent to take property (citing *Peabody*, 231 U.S. 530)); see also Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles: Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CALIF. L. REV. 53, 82–83 (1990) (analyzing the Supreme Court's decisions in *Portsmouth I* and *Peabody* and determining that in both cases, the Court determined there was no sufficient governmental intent because there was no evidence that in firing the guns at Fort Foster, the federal government intended to render the property owners incapable of using their property, subsequently causing economic harm).

⁶⁵ See *Portsmouth I*, 250 U.S. at 2 (determining that even though there had been more gunfire since the *Peabody* decision, there was no new evidence presented in *Portsmouth I* that indicated a newfound governmental intent to acquire the plaintiff's property, thus leading the Court to find there was no taking).

⁶⁶ See 260 U.S. 327, 330 (1922) (remanding the case to the Court of Claims to determine whether the federal government intended to convert the private hotel property for a public purpose, such that the government would be required to compensate the property owners).

pensation for the federal government taking their property.⁶⁷ Following the *Peabody* and *Portsmouth I* decisions, the government removed the original guns on Fort Foster and provided them to France for its military operations during World War I.⁶⁸ After removing the guns, the United States government installed a new set of guns that could only be fired in a way that would cross the plaintiff's property.⁶⁹ Further, in 1920—after the plaintiffs initiated their suit against the government—the government fired the weapons across the plaintiff's property.⁷⁰

In *Portsmouth II*, the Court held that if the government repeatedly and continuously used an individual's land for governmental purposes, then that could constitute a taking.⁷¹ The Court maintained the rule that governmental intent to use land for governmental purposes would constitute a taking.⁷² The Court determined that in the present case, the government's decision to create a fire station on Fort Foster could demonstrate it intended to use the plaintiff's property in its firing exercises.⁷³ The Court held that demonstrating governmental intent was not necessary in all cases for governmental actions to be a taking.⁷⁴ Although intent could be indicative of a taking, the Court held that it was no longer strictly necessary.⁷⁵

Next, the Court reasoned that even if the government did not intend to subject the plaintiff's property for its own use, the continuous firing of guns

⁶⁷ See *id.* at 328 (noting how the Court had denied the plaintiffs judicial relief in prior cases based on the same property).

⁶⁸ See *id.* at 329 (observing how the Portsmouth landowners claimed that the federal government removed the original Fort Foster guns to send to France to aid its efforts during World War I). The landowners further alleged that the newly replaced guns were assembled in such a way that they could only be shot in a direction that went across their land. See *id.* (noting how the government allegedly also newly created a fire station on Fort Foster).

⁶⁹ See *id.* (highlighting the plaintiff's allegation that the newly installed guns demonstrated the federal government's clear intent and capability to fire guns across the plaintiff's property).

⁷⁰ See *id.* (noting how the federal government fired guns from Fort Foster in 1920 after the plaintiffs sued the federal government for a third time, claiming that its actions constituted a taking of their property).

⁷¹ See *id.* (affirming the Court's prior reasoning that firing a single shot across the plaintiff's property would be insufficient to constitute a taking). Nevertheless, the Court observed that continuous interference with the plaintiff's property by repeatedly firing gun shots from Fort Foster could be sufficient to demonstrate that the government was using private property for its own use and benefit. *Id.* at 329–30.

⁷² See *id.* at 330 (reiterating that if the government had intent to subject the plaintiff's land for its own use, then that would be a taking of the plaintiff's property).

⁷³ See *id.* (observing that the government's decision to take further steps beyond invading the petitioner's property by creating a fire station close to the guns could indicate its intent to fire guns in the future across the plaintiff's land, thereby using the plaintiff's land for the government's benefit).

⁷⁴ See *id.* at 329 (holding that repeated government action could constitute a taking even in the absence of clear intent to take private property for public use).

⁷⁵ See *id.* at 329–30 (holding that intent is now sufficient but not necessary for a plaintiff to successfully allege that government behavior constituted a taking of private property).

could be sufficient to constitute a taking.⁷⁶ Therefore, the Court developed a new factor for consideration in determining governmental takings, where plaintiffs could succeed by demonstrating continuous interference with the use of their property.⁷⁷ The Court reasoned that each time the government physically interfered with an individual's property, property owners could use this trespass as evidence to demonstrate a taking.⁷⁸

Conversely, the dissenting justices argued that firing the guns across the petitioner's land was not a taking.⁷⁹ The dissent focused on the factual circumstances of the government's actions at Portsmouth to argue that no taking of private property occurred.⁸⁰ Critically, the dissent argued that when the government fired the guns across the plaintiff's property in December of 1920, there was still a war between the United States and Germany and Austria-Hungary, thereby suggesting that the need to practice firing guns during war diminished the plaintiff's ability to otherwise bring a takings claim.⁸¹

The dissent drew upon the Court's prior reasoning in *Peabody* that if the government fired shots during wartime, those actions would not constitute a

⁷⁶ See *id.* (noting that if the government fired the guns repeatedly and over a period of time, then that could be a taking). The Court noted that one singular shot across the property would still be insufficient to demonstrate a taking, absent intent. *Id.*

⁷⁷ See *id.* (detailing how consistent interference with the use of individual property could be sufficient evidence of a taking).

⁷⁸ See *id.* at 330 (observing how even though the plaintiffs did not have sufficient evidence to succeed on a takings claim, the fact that the government began to fire additional shots in 1920 and installed a fire station could collectively show the government subjected the plaintiff's Portsmouth property to its own use).

⁷⁹ See *id.* at 339–40 (Brandeis, J., dissenting). The federal government is protected from being sued by its citizens through the sovereign immunity clause by barring individual suits. See U.S. CONST. amend. XI (creating a sovereign immunity protection for the federal government); see, e.g., *Portsmouth II*, 260 U.S. at 339 (Brandeis, J., dissenting) (arguing that there was no contractual basis for the plaintiffs to recover from the federal government under the Tucker Act); see also Recent Case, *Sovereign Immunity*, 93 HARV. L. REV. 189, 194 (1979) (observing how the Tucker Act was an exception to the sovereign immunity clause of the Eleventh Amendment because the federal government waived its protection against suits related to certain tort claims); *Sovereign Immunity*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining sovereign immunity as “[a] government’s immunity from being sued in its own courts without its consent”).

⁸⁰ See *Portsmouth II*, 260 U.S. at 333–34 (Brandeis, J., dissenting) (stating that the only significant differences in the facts in *Portsmouth II* and the prior cases of *Peabody* and *Portsmouth I* were that the government had since installed new guns at Fort Foster, a fire station on the plaintiff's property, and had deployed the guns in 1920).

⁸¹ See *id.* at 335–36 (noting the Court's position that firing guns for practice during war, or in anticipation of war, was not a taking); see also U.S. DEP'T OF STATE, 13 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: THE PARIS PEACE CONFERENCE/1919, at 20–21 (1919), <https://history.state.gov/historicaldocuments/frus1919Parisv13/ch3#:~:text=A%20general%20license%20had%20been,as%20of%20July%202%2C%201921> [<https://perma.cc/6PF4-BFXD>] (explaining how World War I ended in 1921 following the suspension of congressional war powers in July 1921, but that the war between the United States and Germany formally ended in October 1921 when Congress approved a peace treaty between the two nations).

taking.⁸² Because there was still a war with Germany and Austria-Hungary, the dissenting justices argued that it was justified for the military to fire practice rounds across the plaintiff's property in preparation for potential conflict.⁸³ Further, the dissent argued that the petitioners failed to demonstrate that the military was authorized to physically take their land.⁸⁴ In the dissent's view, merely reinstalling weapons on neighboring property was insufficient evidence of authorization to physically take the property or place a related servitude upon the land.⁸⁵ Additionally, the dissent emphasized that in 1920, the military had to send Congress estimates of expected costs for military operations.⁸⁶ Because the estimate did not include the cost of acquiring private property, the dissent argued that military officials did not have express authorization to acquire the plaintiff's property.⁸⁷

C. Development of Takings Jurisprudence

Since the Supreme Court rendered its early takings decisions in cases such as *Peabody*, *Portsmouth I*, and *Portsmouth II*, the Court developed different standards for assessing takings claims based on the differing types of government actions.⁸⁸ In the first category, the Court retained its longstanding po-

⁸² See *Portsmouth II*, 260 U.S. at 335–36 (Brandeis, J., dissenting) (noting how the presence of war or conflict gives the government the right and justification to fire guns over property without such actions constituting a taking); *Peabody v. United States*, 231 U.S. 530, 538 (1913) (creating a delineation of whether the military's firing of guns would be a taking depending on whether it was done during war or peacetime).

⁸³ See *Portsmouth II*, 260 U.S. at 335–36 (Brandeis, J., dissenting) (agreeing that the government can fire practice rounds during war without having those actions amount to a taking of property because of the special need for military practice and preparation during war and conflict).

⁸⁴ See *id.* at 337 (arguing that the government could not be liable for compensation for a taking in the absence of military officials having express authorization to either take the plaintiff's land itself or place a servitude on the land).

⁸⁵ See *id.* at 335, 337–38 (finding no evidence that the federal government authorized the military officials at Fort Foster to actually take the plaintiff's land or impose a servitude onto the plaintiff's land). Thus, in the absence of the military expressly authorizing a taking or easement, plaintiffs would not be able to recover against the government. *Id.*

⁸⁶ See *id.* at 338 (highlighting how Congress passed a law in 1919 that required the military to provide Congress with estimates of anticipated expenses beginning in 1920).

⁸⁷ See *id.* at 338–39 (drawing attention to the Secretary of War's decision not to include the cost of acquiring private property in its annual estimate of expenses). Because the Secretary chose to not include that cost in the military's yearly estimated \$15,000 in expenses, the dissent argued that military officials in Maine could not have been authorized to acquire the plaintiff's land or a related servitude. *Id.* Furthermore, the dissent argued that the fact that the military offered to purchase part of the landowner's property so they could build a fire station, which the owners turned down, was demonstrative of the lack of intent to physically take the property. See *id.* at 339 (noting how the military offered the landowners money for 200 acres of their property for the purpose of building a fire station, thereby showing that the government did not have authority to actually take the property).

⁸⁸ See *Peabody v. United States*, 231 U.S. 530, 539 (1913) (holding that the government's actions in firing guns over private land were insufficient to constitute a taking); *Portsmouth Harbor Land & Hotel Co. v. United States (Portsmouth I)*, 250 U.S. 1, 1–2 (1919) (affirming the Court's prior stance

sition that physical acquisitions and invasions of property constituted takings.⁸⁹ The Court deemed this first category to be per se takings, thereby requiring the government to provide compensation for the property acquired.⁹⁰

In 1982, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the United States Supreme Court held that the per se takings category included instances where governmental action resulted in a permanent use of property.⁹¹ A New York state statute required landlords to allow companies onto their property to permanently install cable devices.⁹² The Court determined that permanent en-

in *Peabody* that gun deployments were insufficient on their own to establish a taking of private property); *Portsmouth II*, 260 U.S. at 329–30 (broadening the scope of possible takings by requiring a showing of intent to take property and holding that repeated and constant entry onto private property could demonstrate a taking); see also Ivy, *supra* note 42, at 333–34 (explaining how Justice Holmes articulated a new category of regulatory takings (citing *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922))).

⁸⁹ See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (highlighting the Court's precedent where the government physically acquires private land, that invariably amounts to a per se taking (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321–22 (2002))). In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the government issued temporary halts on construction of property around Lake Tahoe. See 535 U.S. at 307, 308–09, 311–12 (noting how there had been a significant increase in property construction in the area, but that state organizations were concerned about the environmental ramifications of rapid development). California and Nevada implemented two different moratoria on development, where construction was banned around Lake Tahoe in California for 32 months and in Nevada for 8 months. See *id.* at 311–12 (noting how in both states, the ordinances were used on a temporary basis to protect the environment in the Lake Tahoe Basin). The petitioners in *Tahoe-Sierra* argued that the development restrictions impeded their ability to use their property, thereby constituting a per se taking. See *id.* at 320 (observing how the petitioners argued that the temporary nature of the regulation was not dispositive of a regulatory taking because it fully took away their ability to use and profit from their property). The Court rejected the petitioner's argument and instead held that there was no per se taking because the regulation did not take away all rights of the owner in the land, it just removed the economic usage right, thereby not amounting to a per se taking. See *id.* at 327, 332 (holding that there would only be a per se taking if the regulation took away the property owner's capability to use land permanently and not just resulting from temporary regulations affecting a limited number of property rights).

⁹⁰ See *Cedar Point Nursery*, 141 S. Ct. at 2071 (noting that if a taking falls under the per se category, the government must properly compensate the property owner for what the government acquired or took from the owner (citing *Tahoe-Sierra*, 535 U.S. at 321–22)).

⁹¹ See 458 U.S. 419, 441 (1982) (holding that any government authorization of a third party's permanent entry onto an individual's property constitutes a taking). In *Loretto*, a New York state law required landlords to allow third party companies onto their residential properties to install cable equipment. *Id.* at 421–22. In its analysis, the Court emphasized the significance of the ability to exclude others from property. See *id.* at 436 (holding that government-authorized permanent presence on property ruined an owner's ability to have agency over how their property was used). The Court noted, however, that its holding in *Loretto* would not impact the government's ability to oversee and regulate landlords, particularly relating to the health and safety of tenants. See *id.* at 440 (noting that government regulations that merely regulate landlords' conduct and how they use property, but do not authorize permanent third party entry and occupation of property, would not automatically be considered per se takings (citing *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946))).

⁹² See *id.* at 421–22 (observing how the prior owners of the appellant's property allowed cable representatives to install a small cable device on the property in accordance with New York state law requiring landlords to provide such access).

try of private property was a per se taking because such actions effectively deprived property owners of a portion of each of their property rights.⁹³

Conversely, in 1980, in *PruneYard Shopping Center v. Robins*, the United States Supreme Court held that temporary occupations or use of private property were insufficient to amount to a per se taking.⁹⁴ In *PruneYard*, a group of students accessed and used a shopping center's property to criticize an anti-Zionism United Nations resolution, which they argued the California State Constitution permitted because the shopping center was publicly accessible.⁹⁵ Here, the Court determined that temporary governmental interference with exclusion rights required application of a balancing test, thereby denying the petitioner's argument that it was a per se taking.⁹⁶ Further, the Court has analyzed regulations that interfered with property exclusion by applying the *Loretto* takings analysis.⁹⁷

⁹³ See *id.* at 435 (reasoning that when government activity results in permanent occupation of private property, the government action essentially takes away parts of each important property right, thereby justifying the Court's decision to find a taking (citing *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979))). The Court in *Loretto* reasoned that permanent occupation of property amounted to a per se taking because the action interfered with each of the fundamental property rights, including the right to exclude. See *id.* at 435–36 (explaining that the right to exclude was just one of the important property rights by also noting how the regulation interfered with an owner's ability to freely use their own property).

⁹⁴ See 447 U.S. 74, 83–84 (1980) (holding that a state statute allowing individuals to exercise First Amendment speech rights on the private property of a shopping complex did not breach the Takings Clause). In *Pruneyard*, high school activists went to the private shopping mall that allowed the public to enter for shopping. *Id.* at 77. The high school students gave people pamphlets regarding a proposed resolution and solicited support for petitions. *Id.* The students were only on the premises for one afternoon. *Id.* The Supreme Court determined that here, evidence of physical occupation of property was insufficient to qualify as a taking. See *id.* at 83–84 (holding that the activists' temporary presence on the mall owner's property was not a taking because the owner still retained the right and ability to limit their presence at the mall, and because their interference with the property was minimal). Therefore, for temporary usage of private property, the Court determined that a different test applied. See *id.* at 82–83 (determining that the Court must consider and weigh the nature of the state's action, its economic consequences, and how such action interfered with expected profits (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979))); see also *Pick*, *supra* note 44, at 383 (noting how the Court in *Loretto* distinguished between permanent use of property, which were categorically takings, and temporary use of property, which the Court in *Pruneyard* held were not necessarily takings).

⁹⁵ See *Pruneyard*, 447 U.S. at 77 (detailing how high school students used a publicly accessible outdoor shopping mall to gather support for their opposition to an international relations resolution). The students only used the property for this purpose on one afternoon and promptly left the property after a representative of the mall required them to leave. *Id.*

⁹⁶ See *id.* at 83–84 (noting that a temporary use of and entry onto private property was insufficient to automatically constitute a taking and turning to factors such as how the students were peaceful and not disruptive to the owner's use of private property).

⁹⁷ See *Loretto*, 458 U.S. at 438–40 (holding that the permanent use of property amounts to a per se categorical taking); see also *Andrus*, 444 U.S. at 65–66 (explaining how property ownership gives individuals a set of “strand[s]” in a “bundle”). The Court in *Andrus* determined that governmental action that infringes upon one of those strands does not automatically amount to a taking. See 444 U.S. at 65–66 (reasoning that appropriation of one property right does not necessarily indicate a taking because appropriations of rights need to be viewed in their totality); see also *Kaiser Aetna*, 444 U.S. at

In the next category, governmental regulations that too substantially encroach upon property ownership rights could amount to a taking.⁹⁸ For regulatory takings, courts must balance the government's need to regulate property for legitimate purposes through its police powers with the need to protect individual property ownership rights.⁹⁹ Through eminent domain, the government possesses the ability to acquire private property, provided they give property owners adequate compensation.¹⁰⁰ The state's police powers similarly enables it to regulate property use.¹⁰¹

In 1922, in *Pennsylvania Coal Co. v. Mahon*, the Supreme Court developed the regulatory takings doctrine, holding that even in the absence of physical intrusion on property, regulations that were too onerous could violate the Takings Clause.¹⁰² Furthermore, in 1978, in *Penn Central Transportation Co. v. City of New York*, the Supreme Court held that in analyzing potential regula-

179–80 (deeming the ability to exclude to be the central and foundational property ownership right). In *Kaiser Aetna*, the Supreme Court held that governmental infringements on the ability to exclude are takings. See 444 U.S. at 179–80 (deeming the ability to exclude to be so fundamental to property ownership that infringements upon this capability constitute takings that require compensation); see also *Ivy*, *supra* note 42, at 336 (highlighting how the Supreme Court distinguished *Kaiser Aetna* from *Andrus* by newly placing a special emphasis on exclusion rights such that infringement on the right to exclude alone is a *per se* taking).

⁹⁸ See *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (holding that although the government may regulate property ownership, regulations that are too burdensome will be considered takings); see also Sara T. Salley, Note, *Eminent Domain: Supreme Court Regulatory Takings Analysis: How Does Nollan v. California Coastal Commission Fit In?*, 41 OKLA. L. REV. 547, 548 (1988) (observing how prior to the Supreme Court's holding in *Pennsylvania Coal*, courts analyzed land use and property ownership regulations as a component of the government's police powers (citing *Mugler v. Kansas*, 123 U.S. 623, 661 (1887))). Therefore, courts used the standard takings analysis for challenges to the government's use of its police powers, which analyzed whether such regulations were connected legitimate exercises of police powers. See Salley, *supra*, at 548–49 (explaining that prior to *Pennsylvania Coal*, courts analyzed challenges to property regulations under the typical due process standard, which was deferential to regulations as long as they were connected to valid governmental goals in using the police powers). Conversely, courts analyzed actual acquisition of property differently under the Takings Clause. See *id.* at 548 (observing how when there was eminent domain of private land, the Takings Clause compelled the government to provide compensation to affected property owners).

⁹⁹ See *Penn. Coal*, 260 U.S. at 413 (noting that the government must be able to use its police powers to regulate property to a certain degree because without such authority, the government would not be able to properly function); see also *Police Power*, BLACK'S LAW DICTIONARY, *supra* note 79 (defining "police power" as the state's ability to create laws to protect public security and health, among other goals).

¹⁰⁰ See *Ivy*, *supra* note 42, at 328–29 (explaining how the government needs to have eminent domain power, with its main limitation in exercising such power being the compensation requirement); see also *Eminent Domain*, BLACK'S LAW DICTIONARY, *supra* note 79 (defining "eminent domain" as the government's power to seize and utilize an individual's property for public purposes).

¹⁰¹ See *Ivy*, *supra* note 42, at 329 (explaining how the government needs to have the ability to regulate in order to advance critical public interest needs, such as protecting public health and safety).

¹⁰² See 260 U.S. at 413, 415 (determining that regulations must strike a balance between important governmental interests and property rights); see also *Pick*, *supra* note 44, at 376 (noting how the Supreme Court's holding in *Pennsylvania Coal* was vague and did not create a clear category determining which regulations rose to the level of takings).

tory takings, courts must balance several critical factors to determine whether the regulation is too onerous such that it becomes a taking.¹⁰³ The regulatory takings category rested on the notion that if the governmental regulations are too onerous, then they could negatively impact a property owner's ability to enjoy the rights within the "bundle of rights," thereby justifying a taking that requires compensation.¹⁰⁴ Therefore, the line between what constitutes a per se taking and a regulatory taking was important in determining the presence of a taking.¹⁰⁵

D. The Supreme Court's Decision in Cedar Point Nursery v. Hassid

In 2021, in *Cedar Point*, the United States Supreme Court rendered an important decision in the judicial development of takings by holding that a California state regulation authorizing unions to enter private property was a taking.¹⁰⁶ Per the California Labor Code, union officials were permitted to enter agricultural property up to four times annually after providing advance notice and during limited hours when agricultural employees would not be working to minimize disruption.¹⁰⁷ Pursuant to this authorization, union officials

¹⁰³ See 438 U.S. 104, 124 (1978) (establishing that for regulatory takings, courts must apply an ad hoc balancing analysis of the particular aspects of the regulatory action to determine if it constitutes a taking). Relevant factors to weigh include the regulation's character, economic consequences, and negative impact on expected returns on investments in property. See *id.* (noting that whether a regulation amounts to a taking is very dependent on the unique facts and circumstances of that regulation). Thus, the Court in *Penn Central* determined that governmental regulations are not automatically takings. See *id.* (establishing a fact-dependent balancing test instead of a per se test for regulations); see also Pick, *supra* note 44, at 378 (observing the Supreme Court's reluctance to determine that a particular regulation was a taking based on the Court's decision to uphold a use regulation in *Penn Central*, but noting the Court's willingness to find physical invasions to constitute takings); Rebecca Rogers, Note, *Interest, Principal, and Conceptual Severance*, 46 B.C. L. REV. 863, 883–90 (2005) (analyzing the separate prongs of the *Penn Central* balancing test to determine whether there was a regulatory taking of property).

¹⁰⁴ See Bramley, *supra* note 42, at 449–50 (showing that for regulatory takings, courts will examine whether the governmental action took away certain "rights" in the "bundle" because when an individual owns property, they also have a claim to the related property rights, which the government cannot take away without properly compensating the owner (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 831 (1987))).

¹⁰⁵ See Jacqueline Kerry Heyman, Note, *Regulatory Takings: When Is Enough, Enough?*, 11 J. NAT. RES. & ENV'T L. 325, 325 (1996) (observing how cases brought under the Takings Clause focus on whether the regulation was sufficiently burdensome to become a taking).

¹⁰⁶ See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069, 2074 (2021) (holding that a regulation enacted under the California Agricultural Labor Relations Act that permitted union officials to enter private agricultural property to garner union support was a taking under the Fifth Amendment); see also CAL. CODE REGS. Tit. 8, § 20900(e) (2020) (outlining the limitations to the access regulation), *invalidated by Cedar Point*, 141 S. Ct. 2063.

¹⁰⁷ See *Cedar Point*, 141 S. Ct. at 2069 (detailing how a California state regulation required owners of agricultural property to allow union organizers to enter their property and that denial or interference with entry could violate regulations regarding fair labor practices). Provisions of the state regulation included only allowing union organizers to go onto the property on four separate thirty-day periods each year, requiring advance, written notice of any upcoming entry, limiting the number of union officials that could enter the property based on the number of employees each property had, prohibit-

entered the strawberry grower's property and unsuccessfully tried to enter the grape grower's property.¹⁰⁸ Subsequently, their respective property owners both sued the state of California for effectively taking their property by permitting access to union officials.¹⁰⁹

The critical question in *Cedar Point* was whether regulations that temporarily suspended the right to exclude automatically became per se takings such that the government had to compensate property owners.¹¹⁰ For there to be a per se taking, the Court articulated that there must be some physical takeover of the property, regardless of whether that takeover stemmed from a regulation or an actual acquisition of the property.¹¹¹ The Court held in that governmental

ing officials from disrupting work, and limiting entry to hours outside of standard working hours. *See id.* (explaining the various protocols that the California Code implemented); *see also* CAL. CODE REGS. tit. 8, § 20900(e) (2020) (creating several restrictions on union access to agricultural property).

¹⁰⁸ *See Cedar Point*, 141 S. Ct. at 2069–70 (observing how there were two separate incidents, one where union officials went onto the property of Cedar Point Nursery, which grew strawberries, and another where officials tried to enter the property of Fowler Packing Company, which grew grapes). When union officials went onto the property of Cedar Point Nursery, they were disruptive. *See id.* at 2070 (observing how the union official's conduct resulted in several employees abandoning work to join the union officials while others stopped working entirely). At Fowler Packing Company, the union officials unsuccessfully attempted to enter the agricultural employer's property. *See id.* (noting how the owners sued the state on the basis that the union officials could reattempt entry).

¹⁰⁹ *See id.* at 2070 (presenting the procedural history of the case); *see also* *Cedar Point Nursery v. Gould*, No. 16-cv-00185-LJO-BAM, 2016 WL 1559271, at *5, 6 (E.D. Cal. Apr. 18, 2016) *aff'd sub nom.* *Cedar Point Nursery v. Shiroma*, 923 F.3d 524 (9th Cir. 2019), *rev'd and remanded sub nom.* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (denying the plaintiffs from a preliminary injunction under the Takings Clause because in the district court's view, the state regulation did not amount to a per se taking because it did not authorize continuous access to the farms). The Ninth Circuit confirmed that in the absence of permanent occupation, the California state regulation was not automatically a taking. *See Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 533 n.8 (9th Cir. 2019) (determining that *Kaiser Aetna* did not stand for the proposition that physical invasions automatically indicate takings (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 178–80 (1979)), *rev'd sub nom.* *Cedar Point*, 141 S. Ct. 2063. Conversely, a dissenting judge on the Ninth Circuit argued that California's regulation was a per se taking. *See Cedar Point*, 923 F.3d at 538 (Leavy, J., dissenting) (arguing that because California's regulation permitted continuous entry onto private property, thereby infringing upon the right to exclude, the regulation was a per se physical taking (citing *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994))). Further, the Ninth Circuit of the United States Court of Appeals declined to revisit the case en banc. *Cedar Point Nursery v. Shiroma*, 956 F.3d 1162, 1162 (9th Cir. 2020) (en banc).

¹¹⁰ *See Cedar Point*, 141 S. Ct. at 2071 (demonstrating how the Supreme Court decided to review the scope of per se takings and whether regulating exclusion rights fell into that category of takings).

¹¹¹ *See id.* (observing that where the government physically obtains an individual's property for public purposes, that physical acquisition is a per se taking (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321 (2002))). Under the per se category of takings, the government is automatically required to compensate property owners for property the government obtained. *See id.* (noting that under this category of takings, the Fifth Amendment's Taking Clause clearly compels the government to appropriately pay landowners); *see also* U.S. CONST. amend. V (requiring compensation to property owners when the government takes private property). Additionally, the presence of a governmental regulation was not necessary for governmental conduct to be a per se automatic taking. *See Cedar Point*, 141 S. Ct. at 2072 (noting that a physical, per se taking may occur from a governmental regulation (citing *Horne v. Dep't of Agric.*, 576 U.S. 350, 360 (2015))).

actions that encroached on property exclusion rights were within the category of per se takings.¹¹² Therefore, the California state regulation that permitted union organizers to enter private agricultural property resulted in a per se taking because the government took the core property right to exclude from the farm owners and gave it to other persons.¹¹³ Although the Court in *Cedar Point* expanded the scope of per se takings, the majority noted that there were several exceptions from this category, including trespass and instances where property owners relinquished particular property rights in exchange for a government benefit.¹¹⁴

In contrast with the majority, the dissenting justices argued that access regulations were not per se takings and instead should be assessed under the *Pennsylvania Coal* and *Penn Central* regulatory takings analysis.¹¹⁵ The dissent argued that in order for there to be a per se taking, there needed to have been actual appropriation of property.¹¹⁶ In the dissent's view, California's access regulation did not grant the state a property right, but rather regulated the property

¹¹² See *Cedar Point*, 141 S. Ct. at 2072 (holding that access regulations are actual takings of individual property and therefore fall under the umbrella of categorical per se takings).

¹¹³ See *id.* at 2080 (determining that California's regulation permitting access to union representatives took away the farm owner's property exclusion rights and gave them to the unions, which qualified as a per se taking).

¹¹⁴ See *id.* at 2078–79 (outlining the three categories of exceptions from the Court's holding that per se takings now automatically included instances where the government took away the fundamental property exclusion right). First, the Court excluded trespass and determined that if the government sporadically invaded land, with no authorization to do so, then that would not be a taking. See *id.* at 2078 (distinguishing between isolated government trespass and continuous authorized government entry onto property, which would be a per se taking (citing *Portsmouth Harbor Land & Hotel Co. v. United States (Portsmouth II)*, 260 U.S. 327, 329–30 (1922))). Next, the Court determined that government actions would not be per se takings when the government acted in accordance with established understandings of limitations upon property rights. See *id.* at 2079 (determining that it would not be a per se taking if the government infringed upon a non-existent property right, such as limiting a property owner's ability to participate in a nuisance (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992))). Finally, the Court determined that per se takings did not include instances where governmental benefits were conditional on enabling the government to access private property. See *id.* (determining that certain governmental benefits requiring access would not be per se takings, which the Court alleged would preserve the government's ability to inspect certain properties (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987))).

¹¹⁵ See *id.* at 2081 (Breyer, J., dissenting) (arguing that California's union entry regulation was not a per se taking); see also *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (setting the standard that certain regulations could become takings if they were too burdensome upon property owners); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (clarifying that for regulatory takings, courts must apply a balancing test to differentiate between permissible regulations and those that were too burdensome).

¹¹⁶ See *Cedar Point*, 141 S. Ct. at 2083 (Breyer, J., dissenting) (stating that in order for governmental action to indicate a per se taking, there must have been some physical taking of property). The dissent did not view a restriction on limited property rights as sufficient enough to equal a physical taking of property. See *id.* (drawing a distinction between taking property rights and merely regulating property rights).

owner's capacity to exclude.¹¹⁷ The dissent argued that the majority incorrectly equated appropriation of a property right, which is a per se taking, with mere regulation of a particular property right, which is not necessarily a taking.¹¹⁸

In particular, the dissent favored retention of the distinction between permanent and temporary uses and takings of property.¹¹⁹ The dissent raised concerns that the majority's broad application of the per se takings test would make it more difficult for the government to balance regulating and respecting heightened property rights.¹²⁰ For instance, many governmental regulations that serve important public purposes, such as conducting food production inspections, could potentially become per se takings.¹²¹ The dissent argued that the outer limits of the majority's new per se takings standard were unclear.¹²² As a consequence, necessary, publicly beneficial regulations will potentially face significant challenges, thereby threatening the government's power to regulate.¹²³

¹¹⁷ See *id.* (noting that even though the California state regulation concerned exclusion rights, it did not permit the government to authorize parties to actually take away those exclusion rights).

¹¹⁸ See *id.* (highlighting how determination of the appropriate category of takings, either per se or regulatory, is dependent on whether the regulation permits entry on a permanent or temporary basis).

¹¹⁹ See *id.* at 2083–84 (demonstrating how the Court's precedent in retaining a differentiation between permanent and limited entry onto property was important in setting a boundary between per se and regulatory takings). Compare *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding that a per se taking occurred because a governmental regulation approved permanent use of private property), with *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83–84 (1980) (determining that there was no per se taking because the regulation allowing teenage activists to demonstrate on the mall property only allowed temporary use of the property).

¹²⁰ See *Cedar Point*, 141 S. Ct. at 2087 (Breyer, J., dissenting) (arguing that the government must have the ability to temporarily enter private property in order to regulate).

¹²¹ See *id.* (demonstrating that governmental regulations that permit periodic entry onto property, such as allowing the government to inspect workplace conditions, could now be per se takings, thereby limiting the government's ability to properly regulate (citing 29 U.S.C. § 657(a))). The dissent showed how the new formation of per se takings could inhibit regulations permitting food safety inspections. *Id.* (citing 21 U.S.C. § 606(a)).

¹²² See *id.* at 2088 (arguing that the majority's set of exceptions from the per se takings category increased the complexity of the per se takings doctrine). First, the dissent questioned how courts would be able to determine the exception for isolated governmental entry onto private property. See *id.* (arguing that it was difficult to determine the distinction between isolated and temporary entry onto property). Next, the dissent questioned what would constitute historically acceptable governmental access onto property. See *id.* at 2088–89 (calling into question how courts would be able to determine which long-lasting access rights were exempted from the per se takings category). Finally, the dissent argued that the exemption from per se takings in limited scenarios for access rights implemented as qualifications for "certain benefits" was too ambiguous. See *id.* at 2089 (finding that the scope of this exemption was broad and would be difficult to administer).

¹²³ See *id.* at 2088–89 (suggesting that the majority's opinion paves the way for significant challenges to a wide variety of critical regulations, which were based on and enforced via a degree of governmental ability to enter and inspect property).

II. CEDAR POINT AND ITS PLACE IN TAKINGS JURISPRUDENCE

The Supreme Court's decision in *Cedar Point* reshaped the perception of the right to exclude, where the majority viewed this as the central right in property ownership.¹²⁴ The Court held that interference with this one property right was so incompatible with property ownership that such governmental action constitutes a per se taking.¹²⁵ Previously, the Court had relied on a distinction between governmental regulations and actual occupation or invasion of property.¹²⁶ The Court's decision in *Cedar Point* altered this delineation by deeming regulations interfering with exclusion rights to be per se takings.¹²⁷

Section A of this Part examines how the Supreme Court read prior cases, including *Causby*, *Kaiser Aetna*, and *Loretto*, to show the historical deference to exclusion rights as justification for the expanded per se takings category following *Cedar Point*.¹²⁸ Section B focuses on the Supreme Court's reliance

¹²⁴ See *id.* at 2072 (majority opinion) (examining the longstanding judicial deference to an owner's ability to exclude). The Court cited Blackstone's articulation of the notion that the right to exclude was the core aspect of property ownership. See *id.* (noting the foundational right of excluding others from property (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *2)); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 179–180 (1979) (holding that the ability to exclude others from property is a core, fundamental right in owning property such that government regulations that infringe upon that right are takings that require compensation); Dorothy A. Tom, Note, *Kaiser Aetna v. United States: Private Property Rights in a Navigable Marina*, 2 U. HAW. L. REV. 589, 607 (1981) (observing how the Court in *Kaiser Aetna* valued the fact that the plaintiffs had a valid expectancy in owning their property that they would be able to exclusively use the marina and exclude others).

¹²⁵ See Jessica L. Asbridge, *Redefining the Boundary Between Appropriation and Regulation*, 47 BYU L. REV. 809, 820–21 (2022) (observing how the majority opinion greatly relied on the value of exclusion rights in rendering its decision that regulations permitting temporary entry onto property could be per se takings). Notably, the Supreme Court placed a particular emphasis on the right to exclude, but not on other property rights. See *id.* at 821 (highlighting how the Court failed to justify why it was valuing exclusion rights so highly by allowing interference with them to be per se takings, but not reaching the same conclusion regarding other property rights, such as the right to use property).

¹²⁶ See *id.* at 843 (arguing that the Supreme Court had previously made an important distinction between regulatory actions and the eminent domain power of the state, where regulatory actions were not considered takings because of the police power to regulate (citing *Mugler v. Kansas*, 123 U.S. 623, 661–62, 667–68 (1887))). Conversely, the Supreme Court found there to be a taking when government action resulted in private property being used for public benefit, which was a manifestation of the state's eminent domain power. See *id.* at 843–44 (comparing the *Mugler* and *Pumpelly* decisions and arguing that the Court was willing to find a taking in *Pumpelly* under the framework of eminent domain powers when the government effectively used an individual's property for public use by building a dam, consistently flooding the individual's property, such that the property was essentially serving a public use (citing *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872))).

¹²⁷ See *Cedar Point*, 141 S. Ct. at 2080 (elevating government actions that interfere with certain protected property rights to the per se takings category); see also Amy Liang, Comment, *Property Versus Antidiscrimination: Examining the Impacts of Cedar Point Nursery v. Hassid on the Fair Housing Act*, 89 U. CHI. L. REV. 1793, 1802–04 (2022) (explaining the impact of the Supreme Court's decision in *Cedar Point* and how it altered the previous delineation between permanent and temporary entry onto individuals' property).

¹²⁸ See *infra* notes 130–149 and accompanying text.

in *Cedar Point on Portsmouth II* in supporting its argument for the long-standing prominence of exclusion rights.¹²⁹

A. The Case(s) for Per Se Takings

The Supreme Court expanded the per se takings category by interpreting its precedent in prior takings cases to place high significance on the capacity to exclude.¹³⁰ As a result of this historical deference to exclusion rights, the Court determined that infringing upon these exclusion rights was equivalent to the government actually taking the property and thus constituted a taking.¹³¹

To establish this proposition, the Court revisited its takings precedent and determined that in several prior decisions, the Court had determined whether there was a per se taking based on whether the government action interfered with the ability to exclude.¹³² First, the majority cited cases where there were per se takings based on the government's taking of an easement.¹³³ Next, the majority relied on precedent that found per se takings resulting from actual

¹²⁹ See *infra* notes 150–172 and accompanying text.

¹³⁰ See *Cedar Point*, 141 S. Ct. at 2072–73 (citing a line of precedent where the Court previously viewed physical invasions as infringements upon the right to exclude that triggered a requirement to provide compensation to property owners); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982) (holding that permanent occupation of an individual's property is a taking because such occupation eradicates the owner's capacity to use their property as they no longer have any ability to exclude people); *United States v. Causby*, 328 U.S. 256, 259, 266–67 (1946) (finding that there was a taking when the federal government consistently flew planes above a chicken farmer's property at a low altitude); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (emphasizing the particular importance of the ability to exclude).

¹³¹ See *Cedar Point*, 141 S. Ct. at 2073 (analogizing the historical deference to the importance of exclusion rights with the clear judicial principle that actual, physical takings of property and governmental invasions were per se takings).

¹³² See *id.* (determining that there was a longstanding precedent where the Supreme Court treated government invasions of property to amount to per se takings).

¹³³ See *id.* (holding that when the government took an easement over a body of water, that was a per se taking because of the importance of exclusion rights (citing *Kaiser Aetna*, 444 U.S. at 167)); see also *id.* at 2073–74 (observing how there would have been a per se taking if the state government had required the beachfront property owners to permit members of the public to access the beach via their property (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987))). In *Nollan*, the Supreme Court equated governmental taking of an easement with an actual, physical taking. See 483 U.S. at 831 (reasoning that distinguishing between taking of an easement and actually taking property undermined the meaning of the Takings Clause); see also Nicholas V. Morosoff, Note, “‘Take’ My Beach, Please!”: *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823, 844–45 (1989) (observing that the Court's holding in *Nollan* was narrow and only decided that government regulations requiring property owners to implement easements were per se takings, but did not address whether regulations concerning the use of the property would also be takings). Further, the majority in *Cedar Point* cited *Dolan v. City of Tigard* as support for the argument that prior judicial decisions found takings where there was a taking of an easement on property. See *Cedar Point*, 141 S. Ct. at 2074 (noting that in *Dolan*, the Court determined that requiring property owners to have a public servitude would indicate a taking (citing *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994))).

governmental entry onto property.¹³⁴ The Court also observed how per se takings existed where the government allowed permanent and temporary entry onto property.¹³⁵ Critically, the Court determined that appropriations of exclusion rights were takings per se, even in the absence of an easement.¹³⁶

Nevertheless, the majority's reliance on prior cases disregarded the nuances of each decision.¹³⁷ For instance, in 1946, in *Causby*, the Supreme Court held that the government's actions were a taking when the military consistently flew planes at a low altitude over a farmer's property.¹³⁸ Although the majority in *Cedar Point* insinuated that *Causby* stood for the proposition that invasions onto property were inherently takings, *Causby* stood for the more nuanced holding that *continuous* governmental invasions onto property potentially could be takings.¹³⁹

¹³⁴ See *Cedar Point* at 2075 (highlighting how the Court previously decided that sporadic physical entry onto property was still a per se taking (citing *Causby*, 328 U.S. at 259)). In *Causby*, the government used an airport near a farm that flew planes at a very low altitude over the property. See 328 U.S. at 259 (observing that the sound from the planes was so disruptive to the animals on the farm that the property owners had to close the farm). The Court in *Causby* determined that regardless of whether the flights went consistently or sporadically over the plaintiff's land, it would still be a taking if the flights disrupted an owner's property right to use the land. See *id.* at 265–66 (reasoning that in either scenario, the governmental action of flying planes over land would impede upon the property owner's ability to control use of their property). Thus, flying the planes in this manner was equated to the government actually entering the property. See *id.* at 264–65 (determining that the plaintiff would be able to bring a takings claim regarding the airspace above their property).

¹³⁵ See *Cedar Point*, 141 S. Ct. at 2074–75 (presenting cases where the Court found per se takings, regardless of whether government entry was permanent or temporary (citing *Loretto*, 458 U.S. at 436–37)). Furthermore, the majority in *Cedar Point* determined that the length of government entry was only determinative of the amount the government owed to the property owners. See *id.* at 2074 (comparing *Dow* to *Loretto* by arguing that both the length and the size of appropriation were only indicative of compensation owed (citing *United States v. Dow*, 357 U.S. 17, 26 (1958))).

¹³⁶ See *id.* at 2072 (holding that a determinative consideration for a per se taking was the presence of use restrictions, regardless of whether they came from an easement or a regulation (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321–23 (2002))); see also *Easement Definition & Legal Meaning*, LAW DICTIONARY, <https://thelawdictionary.org/easement/> [<https://perma.cc/GZ7M-5JRW>] (defining an easement as an individual's legal right to use another person's real property for a particular purpose, as long as that particular use is in accordance with the other individual's property rights and ownership).

¹³⁷ See *Causby*, 328 U.S. at 264–65 (finding that there was a taking when the government continuously flew military planes over an individual's property); *Kaiser Aetna*, 444 U.S. at 178–80 (considering multiple factual circumstances and determining that the government's conversion of a pond to a marina for public benefit was a taking); see also Asbridge, *supra* note 125, at 855 (highlighting that in *Causby*, there was a clear delineation between government actions that constituted a physical taking of property and those where the government regulated the property too extensively).

¹³⁸ See *Causby*, 328 U.S. at 264–65 (determining that the government's continuous interference with a property owner's ability to use their property free from disruption was a taking because the action impeded upon the right to use property).

¹³⁹ See *id.* (focusing on the continuous governmental invasion to find there was a taking). In *Causby*, the fact that the government invaded the property was an important factor in the Court's reasoning. See *id.* (determining that flying over land in a disruptive manner interfered with the property owner's ability to use their land just as much as a physical entry would). Nevertheless, the Court's

Similarly, in 1979, in *Kaiser Aetna*, the Supreme Court determined that takings could occur when the government interfered with exclusion rights.¹⁴⁰ Although the majority in *Cedar Point* suggested that *Kaiser Aetna* meant that any governmental use of exclusion rights would be a taking, the dissent correctly identified that the *Kaiser Aetna* decision was much more nuanced.¹⁴¹ In *Kaiser Aetna*, the Court determined there was a taking by weighing a number of critical factors, including the public interest at stake, the nature of the governmental regulation, and the government's interference with the property owner's exclusion rights.¹⁴² Thus, the dissent in *Cedar Point* rightly identified that the majority's reliance on *Kaiser Aetna* to show a historic foundation for per se takings was misplaced because *Kaiser Aetna* did not analyze this takings claim under the per se framework.¹⁴³

Furthermore, in *Loretto*, the Supreme Court held that permanent entry on to private property was a per se taking.¹⁴⁴ The *Cedar Point* majority relied on

reasoning was primarily based on the continuous manner in which the government entered the land, and the mere occurrence of an invasion was not the determinative factor in finding a taking. *See id.* at 266 (holding that the government's action was a taking because the consistent flights interfered with the ability to use one's property); *see also* Troy A. Rule, *Airspace and the Takings Clause*, 90 WASH. U. L. REV. 421, 438–39 (2012) (observing how in *Causby*, a deciding factor in determining the presence of a taking was the regularity of the flights over the farm property because the continuous interference with the property from flying planes severely impacted the owner's use of the property).

¹⁴⁰ *See Kaiser Aetna*, 444 U.S. at 166, 178–80 (determining that there was a taking when the Hawaii state government turned an individual's pond into a marina, partially because of the importance of exclusion rights to property ownership).

¹⁴¹ *See Cedar Point*, 141 S. Ct. at 2086 (Breyer, J., dissenting) (arguing that the majority in *Cedar Point* missed a critical aspect of the *Kaiser Aetna* decision by making a generalization that *Kaiser Aetna* held that any physical invasion would be a per se taking, when in actuality the Court engaged in a balancing test (citing *Kaiser Aetna*, 444 U.S. at 178)). In the dissent's view, the majority failed to address how *Kaiser Aetna* differed from *Cedar Point* in the critical point that *Kaiser Aetna* involved a permanent entry onto private property, whereas *Cedar Point* involved only a temporary entry. *See id.* (criticizing the majority opinion for citing *Kaiser Aetna* as support for a per se takings category when *Kaiser Aetna* did not insinuate that temporary entry onto property would be a per se taking).

¹⁴² *See Kaiser Aetna*, 444 U.S. at 178–80 (determining that there was a taking in *Kaiser Aetna* based on multiple factors that made the government's actions too onerous on the property owner, such that the government was required to adequately provide compensation). In *Kaiser Aetna*, the Court analyzed the circumstances by applying the *Pennsylvania Coal* analysis of whether the governmental regulation was too excessive such that the Court would consider it a taking. *See id.* at 178 (determining that the Court would consider multiple factors in its analysis in *Kaiser Aetna* (citing *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922))); *see also Penn. Coal*, 260 U.S. at 415 (holding that government regulations that were too burdensome and that interfered with property ownership rights could be takings).

¹⁴³ *See Cedar Point*, 141 S. Ct. at 2086 (Breyer, J., dissenting) (highlighting how the Court in *Kaiser Aetna* applied a multi-factor analysis of the takings claim before the Court, not an automatic per se analysis based purely on the existence of a physical entry onto property). The Court in *Kaiser Aetna* considered the fact that the property in question did not have prior use as a navigable stream and that the government's actions effectively resulted in a physical invasion of the property. *See Kaiser Aetna*, 444 U.S. at 178–80 (weighing several factors and determining that there was a taking).

¹⁴⁴ *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982) (finding that the government's permanent placement of a box on private property was a per se taking).

Loretto to support its expansion of per se takings but deemphasized the differences between the permanency of entry in each case.¹⁴⁵ The dissent in *Cedar Point* aptly identified this flaw in analysis by arguing that the mere existence of any form of entry was not determinative in *Loretto*, which instead focused on the permanency of the entry.¹⁴⁶

Therefore, the majority opinion painted an incomplete picture of the per se takings category by citing *Causby*, *Kaiser Aetna*, and *Loretto* as support for the historic foundation of per se takings in instances of government entry.¹⁴⁷ In each of these decisions, the Court took a more nuanced approach to determining takings and did not automatically hold that any physical invasion or entry onto property constituted a per se taking.¹⁴⁸ Consequently, the majority's foundation for expanding the per se takings category in *Cedar Point* lacked a full analysis of critical prior takings decisions.¹⁴⁹

¹⁴⁵ See *Cedar Point*, 141 S. Ct. at 2076 (relying on *Loretto* for support in determining that any occupation of land, either temporary or permanent, constituted a per se taking). Compare *Loretto*, 458 U.S. at 441 (determining that government authorized entry onto an individual's property would be a per se taking if such entry was permanent), with *Cedar Point*, 141 S. Ct. at 2076 (determining that any type of entry onto property took away exclusion rights from property owners, thereby requiring a finding of a per se taking).

¹⁴⁶ See *Cedar Point*, 141 S. Ct. at 2083 (Breyer, J., dissenting) (arguing that the majority missed the critical point in *Loretto*, where the Court previously determined that only permanent occupation of property would become a per se taking (citing *Loretto*, 458 U.S. at 441)).

¹⁴⁷ See *id.* at 2073 (majority opinion) (finding a historical basis for per se takings through government's approval of invasion (citing *United States v. Causby*, 328 U.S. 256 (1946))); see also *id.* at 2073 (determining that *Kaiser Aetna* likewise fit within the per se takings framework (citing *Kaiser Aetna*, 444 U.S. at 167)); *id.* at 2083 (Breyer, J., dissenting) (acknowledging that the mere presence of any physical entry did not automatically justify finding a per se taking (citing *Loretto*, 458 U.S. at 441)). Despite the Supreme Court finding takings in *Causby*, *Loretto*, and *Kaiser Aetna*, the Court in *Cedar Point* failed to address the complexity of these cases. See *id.* at 2086 (Breyer, J., dissenting) (arguing that the actual ambiguity in the cases the majority cited was regarding the importance of the temporary versus permanency distinction).

¹⁴⁸ See *Causby*, 328 U.S. at 266 (finding that a taking could exist following a high frequency of physical invasions); *Kaiser Aetna*, 444 U.S. at 178–79 (weighing several factors prior to finding a taking); *Loretto*, 458 U.S. at 435–36 (determining there was a taking because of permanent occupation of property, thereby partially depriving property owners of all property rights).

¹⁴⁹ See *Cedar Point*, 141 S. Ct. at 2077 (determining that because exclusion rights were so central to the conceptual understanding of property ownership, any governmental attempt to interfere or infringe upon this right would be a per se taking (citing *Kaiser Aetna*, 444 U.S. at 179–80)). But see *Kaiser Aetna*, 444 U.S. at 178–80 (encountering an instance where there was a governmental intrusion upon exclusion rights and still considering numerous factors prior to finding a taking, thus not automatically finding a per se taking); *Cedar Point*, 141 S. Ct. at 2084–85 (Breyer, J., dissenting) (focusing on the importance of the Court's prior distinctions between permanent and temporary entry onto property and arguing that the majority opinion failed to thoroughly address this distinction in its justification for expanding the per se takings category).

B. The Supreme Court's Decision to Rely on *Portsmouth II*

A critical component of the *Cedar Point* opinion was the Supreme Court's decision to cite to its 1922 decision in *Portsmouth II*, nearly one hundred years after issuing the decision.¹⁵⁰ The Court's reliance on *Portsmouth II* in creating its newly expanded per se takings formulation provided an illustrative demonstration of how the Court was willing to reconfigure its precedent to justify its decision to expand the per se takings category.¹⁵¹

The majority in *Cedar Point* used its precedent in *Portsmouth II* as central support in holding that regulations limiting use of property, in terms of exclusion rights, are per se takings instead of regulatory takings.¹⁵² The majority utilized *Portsmouth II* to hold that there was a per se taking when the military fired its guns across the hotel property because the government appropriated exclusion rights.¹⁵³ According to the majority, the Court decided in *Portsmouth II* that exclusion rights were uniquely central to property ownership rights, such that anytime the government infringed upon those rights, it was a per se taking.¹⁵⁴ Critically, the Court presented *Portsmouth II* as a case reflecting the historical importance of exclusion rights in perceptions of individual freedom and liberty.¹⁵⁵

Furthermore, the majority in *Cedar Point* determined that *Portsmouth II* was analogous to *Causby* and *Loretto* in that each case found per se takings where the government co-opted exclusion rights.¹⁵⁶ In these cases, per se tak-

¹⁵⁰ See *Cedar Point*, 141 S. Ct. at 2073, 2076–78 (citing to *Portsmouth II*, close to one hundred years after the Court rendered the decision in 1922).

¹⁵¹ See *id.* at 2078 (arguing that *Portsmouth II* held that physical invasions amounted to takings). But see *Portsmouth Harbor Land & Hotel Co. v. United States* (*Portsmouth II*), 260 U.S. 327, 329–30 (1922) (holding that a taking would only occur when there was a physical invasion and governmental intent to take private property).

¹⁵² See *Cedar Point*, 141 S. Ct. at 2073, 2076 (noting that *Portsmouth II* stood for the proposition that when the government exercised its right to shoot guns across an individual's property, that was a per se taking (citing *Portsmouth II*, 260 U.S. at 330)).

¹⁵³ See *id.* (stating that the determining factor in *Portsmouth II* was that the government took away a property owner's core exclusion rights, constituting a per se taking).

¹⁵⁴ See *id.* at 2078 (arguing that the central issue in *Portsmouth II* was whether the government physically invaded public property (citing *Portsmouth II*, 260 U.S. at 329–30)). According to the majority, physical invasions onto property included infringement upon exclusion rights. See *id.* at 2073 (classifying a governmental invasion as a per se taking).

¹⁵⁵ See *id.* at 2073 (explaining how the Court in *Kaiser Aetna* cited *Portsmouth II* to reach the conclusion that physical entry onto private property constitutes per se takings (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979))); see also *id.* at 2071 (relying on the importance of property rights to the Founding Fathers by presenting a quote from John Adams, where he presented property rights as a necessary component of liberty, stating that “[p]roperty must be secured, or liberty cannot exist” (quoting Adams, *supra* note 26, at 280)).

¹⁵⁶ See *id.* at 2076 (determining that each case stood for the same principle that physical invasions were the determinative factors in per se takings).

ings existed even though there were no formal servitudes on the property.¹⁵⁷ The Court was concerned that disallowing per se takings because of an absence of formal servitudes would enable the government to circumvent the Takings Clause's requirement to compensate property owners.¹⁵⁸ Therefore, the Court decided that deeming appropriations of exclusion rights to be per se takings was aligned with the core purpose of the Takings Clause.¹⁵⁹

Notably, the majority opinion failed to address the nuances of the facts surrounding *Portsmouth II*, particularly by neglecting to mention the landowner's prior failed attempts to seek relief under the Takings Clause in *Peabody* and *Portsmouth I*.¹⁶⁰ The majority opinion presented *Portsmouth II* as exhibiting support for the Court's supposed deference to finding per se takings any time there was a governmental physical invasion.¹⁶¹

Conversely, the actual factual circumstances of *Portsmouth II* were much more complex than the Court painted in *Cedar Point*.¹⁶² Critically, the Court failed to mention how *Portsmouth II* was part of a series of litigated cases, where the Court had previously denied that a taking occurred when the military temporarily invaded the private property by infrequently firing guns across the hotel's land.¹⁶³ Although the *Cedar Point* Court insinuated that

¹⁵⁷ See *id.* (noting that formal servitudes on property are not necessary for there to be a per se taking).

¹⁵⁸ See *id.* (highlighting different ways for the government to take private property, such as by invading or condemning the property through eminent domain). The Court reasoned that in situations where the government invaded property, that did not give the government a property interest in the land. See *id.* (observing that even where the government's invasion of property does not create a property interest, the Court has historically still found categorical takings (citing *United States v. Dow*, 357 U.S. 17, 21 (1958))).

¹⁵⁹ See U.S. CONST. amend. V (prohibiting the government from taking property without also adequately compensating property owners); *Cedar Point*, 141 S. Ct. at 2077 (voicing concerns that disallowing relief under the Takings Clause for appropriation of exclusion rights would be inconsistent with the constitutional principle that property rights cannot be readily altered by the government); see also *Cedar Point*, 141 S. Ct. at 2077 (highlighting that because exclusion rights are so important in property ownership, the government cannot amend them without such action becoming a per se taking (citing *Kaiser Aetna*, 444 U.S. at 179–80)).

¹⁶⁰ See *Cedar Point*, 141 S. Ct. at 2073, 2076 (bringing in the *Portsmouth II* decision merely as support for a new per se takings category based on a historic foundation of deference to exclusion rights, but failing to mention any of the prior cases that were critical in forming the *Portsmouth II* decision, particularly *Peabody* and *Portsmouth I*).

¹⁶¹ See *id.* at 2076 (arguing that *Portsmouth II* was part of a line of cases where the Court had determined there to be takings whenever there was a governmental physical invasion of property on the basis that the government took away the central property right of exclusion).

¹⁶² See *id.* at 2073 (arguing that the firing of the guns was the determining factor in *Portsmouth II* because it was a physical invasion). But see *Portsmouth Harbor Land & Hotel Co. v. United States (Portsmouth II)*, 260 U.S. at 328–30 (observing how the Court had previously disallowed a takings claim on this property, but that in this case, a key change in factual circumstances occurred where the military had established a fire station and then fired guns again, which was suggestive of governmental intent to take the land).

¹⁶³ See *Cedar Point*, 141 S. Ct. at 2073, 2076 (relying on *Portsmouth II* and deeming it to have focused on appropriation of core property rights exclusion through the government's invasion of the

Portsmouth II was a taking because the government invaded the property, the series of cases clearly demonstrated that the Court only found a taking in *Portsmouth II* because the petitioners successfully showed the military's intent to consistently use its property for public purposes.¹⁶⁴

For instance, in *Peabody*, the Court initially declined to determine that there was a taking of property because the government did not intend to take the land for its own use.¹⁶⁵ Likewise, in 1919, in *Portsmouth I*, the Court similarly declined to hold that a taking occurred because of the insufficient demonstration of governmental intent, even when the military continued to physically invade the property by firing guns across the Portsmouth property.¹⁶⁶ Nevertheless, the Court in *Cedar Point* cited neither *Peabody* nor *Portsmouth I*, thereby failing to address why the Court declined to determine that takings occurred in either case despite the government accessing private property.¹⁶⁷

land (citing *Portsmouth II*, 260 U.S. at 330)). The majority in *Cedar Point* did not discuss the intent requirement that the Court previously raised in *Peabody* and *Portsmouth II*, and instead framed the core issue in *Portsmouth II* as the invasion itself. See *id.* at 2076 (claiming that the Court decided to find a taking in *Portsmouth II* because of mere invasion, but declining to mention the intent requirement); see also *Peabody v. United States*, 231 U.S. 530, 539–40 (1913) (determining that infrequent gun firings were insufficient to be a taking absent any military intent to continuously use the property); *Portsmouth Harbor Land & Hotel Co. v. United States (Portsmouth I)*, 250 U.S. 1, 1–2 (1919) (denying a takings claim when the military fired more guns across the same property as in *Peabody*).

¹⁶⁴ See *Cedar Point*, 141 S. Ct. at 2073 (arguing that the Court's decision in *Portsmouth II* rested on the mere fact that the military fired guns across private property (citing *Portsmouth II*, 260 U.S. at 330)). But see *Peabody*, 231 U.S. at 538, 539 (finding that petitioner's claim was inadequate in only showing that the military created a fort near its property and fired guns on sporadic occasions because there was no showing of intent to take the petitioner's property). See also *Portsmouth I*, 250 U.S. at 1–2 (declining again to find a taking because the mere fact that the government fired guns on additional occasions failed to amount to a taking because there was still no showing that the government had the requisite intent to take the land in firing guns and creating a fort).

¹⁶⁵ See *Peabody*, 231 U.S. at 538 (determining that there would have been a taking had the military fired the guns with the requisite intent of taking the Portsmouth property for its own use by subjecting the land to military purposes whenever the government desired). The *Peabody* decision rested on the intent requirement by requiring the petitioners to show governmental intent and not automatically finding a taking purely because the government invaded the land by firing guns across the airspace. See *id.* at 538–39 (resting its decision on the lack of evidence showing that the military, in deciding to fire the guns, had intentionally done so as part of an effort to have the ability to use the Portsmouth property for its own purposes at any time). Thus, the *Peabody* decision required there to be governmental intent to consistently use and take the property in question. See *id.* at 540 (distinguishing intent to consistently use property for governmental purposes and the present case, where the actions were not considered takings).

¹⁶⁶ See *Portsmouth I*, 250 U.S. at 1–2 (affirming the Court's prior stance in *Peabody*, where the Court declined to find a taking because of insufficient evidence of governmental intent, despite the fact that the military invaded the property again when it fired guns after *Peabody*).

¹⁶⁷ See *Cedar Point*, 141 S. Ct. at 2073, 2076 (citing *Portsmouth II*, but not acknowledging the Court's precedent established in *Portsmouth I* and *Peabody*); *Peabody*, 231 U.S. at 538–39 (declining to determine that a taking took place despite the government firing guns); *Portsmouth I*, 250 U.S. at 1–2 (affirming the decision to decline the occurrence of takings in the absence of governmental intent).

Critically, the dissent questioned the majority's reliance on *Portsmouth II* in presenting the historical basis for per se takings in situations of temporary entry.¹⁶⁸ Justice Breyer highlighted how the *Portsmouth II* decision focused on whether the government had the requisite intent to take the property owner's land for public benefit.¹⁶⁹ Furthermore, the dissent argued that the prevalence of shots was only a secondary consideration to the government's intent.¹⁷⁰ In the dissent's view, the majority incorrectly interpreted *Portsmouth II* by ignoring its focus on intent and presenting the holding as a per se taking.¹⁷¹ Instead, the dissent argued that the Court in *Portsmouth II* weighed several critical factors, similar to the *Penn Central* balancing test that the Court later adopted to analyze regulatory takings.¹⁷²

III. THE IMPLICATIONS OF THE CEDAR POINT DECISION

The Supreme Court's decision in *Cedar Point* significantly altered the established perception of property rights by placing a unique and unprecedented importance on exclusion rights.¹⁷³ The Court held that the government is largely incapable of appropriating exclusion rights without such actions being a per

¹⁶⁸ See *id.* at 2085–86 (Breyer, J., dissenting) (arguing that reliance on cases including *Portsmouth II* was misplaced because the takings in those cases were not clearly per se takings (citing *Portsmouth II*, 260 U.S. at 329)).

¹⁶⁹ See *id.* at 2086 (observing how the Court's primary consideration in *Portsmouth II* in determining the occurrence of a taking was whether the military intended to subject the plaintiff's property to the government's use, not whether there was military or governmental entry onto the property).

¹⁷⁰ See *id.* (arguing that the majority in *Cedar Point* incorrectly determined that the Court in *Portsmouth II* held that a taking took place from a per se analysis). The dissent instead argued that *Portsmouth II* was not a per se takings case and that the Court must analyze takings cases by using a series of considerations, similar to a regulatory takings analysis. See *id.* (highlighting that the *Portsmouth II* Court considered numerous factors, including the military's intent in firing guns, the economic harm suffered from the guns, and how frequently the military fired the guns).

¹⁷¹ See *id.* at 2085–86 (arguing that the majority opinion used *Portsmouth II* as evidence of the basis for per se takings in instances of governmental entry, when instead the Court applied an analysis that required the balancing of several factors).

¹⁷² See *id.* at 2086 (observing that a key issue in the cases the majority cited, including *Portsmouth II*, was the distinction between permanent and temporary use of property, because the different categories required different standards of analysis for takings claims). The dissent argued that the majority incorrectly used cases such as *Portsmouth II* to stand for holdings that the Court had not reached. See *id.* (arguing that in cases such as *Portsmouth II*, the Court never considered whether temporary use constituted a per se taking).

¹⁷³ See *Cedar Point* at 2077 (majority opinion) (holding that with respect to exclusion rights, the government cannot regulate or amend a property owner's ability to exclude others); see also Bethany R. Berger, *Eliding Original Understanding in Cedar Point Nursery v. Hassid*, 33 YALE J.L. & HUMANS. 307, 312–13 (2022) (arguing that the Supreme Court's decision in *Cedar Point* was a profound departure from the Court's prior decisions, where the Court viewed appropriation of exclusion rights as regulatory and not per se takings (citing *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 84 (1980))).

se taking.¹⁷⁴ Therefore, the Court took an important step in expanding the scope of per se takings.¹⁷⁵ Section A of this Part explores the significance of the Court's decision regarding exclusion rights.¹⁷⁶ Section B analyzes the implications of the Court's decision in *Cedar Point* to greatly expand the per se takings category and its potential effect on governmental regulation.¹⁷⁷

A. The Elevated Significance of Exclusion Rights

The Supreme Court's decision in *Cedar Point* to alter the perception and importance of exclusion rights resulted in a much broader per se takings category, where any governmental regulations that interfered with critical property rights could be deemed per se takings.¹⁷⁸ Although the Court identified a historical basis for valuing the right to exclude, the *Cedar Point* decision placed this one property right on an unprecedented pedestal.¹⁷⁹

In prior cases, the Court understood and solidified key distinctions between temporary and permanent entry onto private property, as well as between government regulations over property and actual takings of that property.¹⁸⁰ As the *Cedar Point* dissent aptly identified, the Court's previous delineation

¹⁷⁴ See *Cedar Point*, 141 S. Ct. at 2077–78 (determining that because of the critical importance and centrality of exclusion rights, the government was prohibited from altering such exclusion rights without their actions becoming a per se taking); see also Berger, *supra* note 173, at 312 (arguing that in *Cedar Point*, the Court broadly determined that most forms of governmental entry onto property would now be takings).

¹⁷⁵ See Sarah Haddon, Note, *Property Rights: Fiercely Contested, Strongly Guarded, and Continually Defended. How the Supreme Court's Decision in Cedar Point Emphasized the Court's Devotion to Private Property Rights*, 71 AM. U. L. REV. 349, 361 (2021) (observing how in *Cedar Point*, the Court considered its prior distinction between per se and ad hoc takings, and concluded that regulations that took away exclusion rights fell into the per se category).

¹⁷⁶ See *infra* notes 178–193 and accompanying text.

¹⁷⁷ See *infra* notes 194–204 and accompanying text.

¹⁷⁸ See *Cedar Point*, 141 S. Ct. at 2077 (determining that governmental intrusions upon exclusion rights amount to per se takings because of the core importance of the right to exclude in property ownership rights); see also Haddon, *supra* note 175, at 362 (highlighting how the Court in *Cedar Point* analyzed its prior decisions regarding takings and determined that the precedent signaled that exclusion rights were the paramount property rights (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982))).

¹⁷⁹ See *Cedar Point*, 141 S. Ct. at 2077 (relying on *Kaiser Aetna* for support in demonstrating the long-standing deference to exclusion rights (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979))); see also Asbridge, *supra* note 125, at 821 (critiquing the majority in *Cedar Point* for providing an inadequate rationale for its decision to highly value exclusion rights but not other property rights).

¹⁸⁰ See, e.g., *Loretto*, 458 U.S. at 435–36 (drawing a line between permanent and limited governmental occupation of property). The Court in *Loretto* determined that permanent occupations were per se takings because only then did the governmental action take away a component of each of the landowner's rights. See *id.* (resting its decision to find a per se taking on the effect of permanent occupations on someone's property rights); see also *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 84 (1980) (determining that a government-approved temporary entry onto property did not constitute a taking). Further, the Court historically categorized governmental regulations and exercises of eminent

tion between temporary and consistent entry onto property was important in recognizing the different standards for per se and regulatory takings.¹⁸¹ Under the prior framework, it was clear that the Court would analyze temporary entries under a balancing framework, whereas it would view permanent entries under the per se framework.¹⁸² Without such a delineation, the Court strengthened and expanded the per se takings category, when the support for such a conclusion was lacking from the Court's precedent.¹⁸³

In particular, the Supreme Court's dependence on *Portsmouth II* provided a telling illustration of how the Court was willing to retroactively reframe prior decisions in support of strengthening per se takings.¹⁸⁴ Although there was a longstanding basis for valuing exclusion rights of property owners, the Court in *Portsmouth II* did not determine that a taking occurred based on the taking of the right to exclude.¹⁸⁵ In actuality, the determining factor for the Court was new factual support to establish that the military intended to subjugate private property for its own use.¹⁸⁶

domain under separate lenses. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (observing how the Court has upheld governmental regulations that interfere with property rights because they are distinct from actual physical takings of property).

¹⁸¹ See *Cedar Point*, 141 S. Ct. at 2084 (Breyer, J., dissenting) (arguing that the Court misapplied the *Loretto* reasoning to the facts in *Cedar Point* (citing *Loretto*, 458 U.S. at 435)). The dissent focused on how the Court previously emphasized the importance of the permanent nature of governmental entry onto property. See *id.* (noting that the core reason the Court found there to be per se takings resulting from permanent entry was because permanent occupation enabled the government to take a piece of *each* of the landowner's rights). The dissent criticized the majority opinion for blurring this boundary between permanent and temporary entry. See *id.* at 2087 (observing how this new boundary will have negative implications on the government's ability to adequately regulate).

¹⁸² See *Berger*, *supra* note 173, at 312–13 (observing how the Supreme Court only determined that there was a taking in *Causby* because the government's actions amounted to damage of private land, noting that without such damage, the temporary invasion of land would not automatically amount to a taking (citing *United States v. Causby*, 328 U.S. 256, 260 (1946))); see also *id.* at 313 (noting that in *Pruneyard*, the Court did not automatically find a per se taking when there was a temporary government-approved invasion of private property (citing *Pruneyard*, 447 U.S. at 84)).

¹⁸³ See *Cedar Point*, 141 S. Ct. at 2084 (Breyer, J., dissenting) (arguing that the Court had historically delineated between temporary and permanent entry onto private property (citing *Loretto*, 458 U.S. at 435)); see also *Berger*, *supra* note 173, at 313 (arguing that the Court's reliance on certain precedent, such as *Causby*, was misguided because it ignored the core questions at issue in those cases (citing *Causby*, 328 U.S. at 260)).

¹⁸⁴ See *Cedar Point*, 141 S. Ct. at 2073, 2076 (stating that *Portsmouth II* was an example of a case where the Court previously found a taking because the government took away someone's key property right of exclusion (citing *Portsmouth Harbor Land & Hotel Co. v. United States (Portsmouth II)*, 260 U.S. 327, 330 (1922))).

¹⁸⁵ See *id.* at 2072 (demonstrating that the Court had considered exclusion rights to be one of the central aspects of property ownership (citing *Loretto*, 458 U.S. at 419, 435)). But see *Portsmouth II*, 260 U.S. at 330 (determining that the military's decision to implement a fire station near the Portsmouth property could be sufficient to show the government's purpose to subjugate the property for public use and benefit).

¹⁸⁶ See *Portsmouth II*, 260 U.S. at 329–30 (noting that the Court previously denied a takings claim because of the lack of evidence of governmental intent, but explained that if the military had

Nevertheless, in *Cedar Point*, the Court over-simplified the *Portsmouth II* holding by using it as support for including as per se takings instances where the government interfered with certain protected property rights.¹⁸⁷ The majority made a generalization that the Court decided *Portsmouth II* under the same framework as *Causby* and *Loretto*, namely that any infringement upon exclusion rights automatically indicated a per se taking.¹⁸⁸ This generalization was incorrect, as was evident by *Portsmouth II* and the Court's requirement of showing subjective intent on the part of the government to take property for public use.¹⁸⁹

Furthermore, the Court's willingness to misconstrue its prior precedent as justification for expanding the per se takings category demonstrated how the Court was willing to reframe critical takings cases to reach its desired result.¹⁹⁰ The Takings Clause has important limitations, where the Court has historically made exceptions to the takings doctrine to enable effective regulation, which state governments require to exercise their police powers.¹⁹¹ The judicial development of the takings doctrine reflects this balance that the Court has aimed to strike between protecting property rights and enabling the government to

fired guns with the intent of effectively taking the property for public benefit, then that could become a taking).

¹⁸⁷ See *Cedar Point*, 141 S. Ct. at 2087 (Breyer, J., dissenting) (observing how the majority's holding determined that many regulations that oversaw and interacted with property rights would now be per se takings).

¹⁸⁸ See *id.* at 2076 (majority opinion) (likening *Portsmouth II* to *Causby* and *Loretto* by determining that all three cases were examples of the Court holding that a taking took place based on the appropriation of the core property right of exclusion). Compare *Portsmouth II*, 260 U.S. at 329–30 (determining that entry onto property alone was insufficient to establish a taking), with *Causby*, 328 U.S. at 266 (determining that governmental interference with airspace was only a taking if the action was frequent enough to disrupt an owner's use of property), and *Loretto*, 458 U.S. at 428 (resting the Court's decision that a per se taking occurred on the permanency of the government's invasion of private property).

¹⁸⁹ See *Portsmouth II*, 260 U.S. at 329–30 (considering numerous factors before determining there could be a taking, including the new fire station and the subsequent gun firings across the property). The Court in *Portsmouth II* was not willing to automatically hold that a per se taking took place purely based on a physical invasion. See *id.* (looking for government intent prior to determining there could be a taking); see also *Portsmouth Harbor Land & Hotel Co. v. United States (Portsmouth I)*, 250 U.S. 1, 1–2 (1919) (holding that mere physical invasion was insufficient to satisfy the intent requirement); *Peabody v. United States*, 231 U.S. 530, 538–39 (1913) (denying a takings claim because there was no support for the notion the government intended to take the land for public use by occasionally firing guns).

¹⁹⁰ See *Cedar Point*, 141 S. Ct. at 2085–86 (Breyer, J., dissenting) (arguing that the Court misconstrued the analysis in *Portsmouth II*, where the Court considered numerous factors before determining there may be a taking (citing *Portsmouth II*, 260 U.S. at 329)).

¹⁹¹ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388–90 (1926) (determining that the government must have the power to regulate in order to properly function and deciding that regulation of property is not inherently invalid); see also Robert F. Pecorella, *Property Rights, State Police Powers, and the Takings Clause: The Evolution Toward Dysfunctional Land-Use Management*, 44 *FORDHAM URB. L.J.* 59, 72 (2017) (noting how the Supreme Court in *Euclid* determined that governments could regulate property as a valid exercise of their police powers (citing *Euclid*, 272 U.S. at 388)).

exercise its police powers through regulation.¹⁹² The *Cedar Point* decision signaled the Court's willingness to sacrifice important mechanisms for the government to regulate in an effort to promote private property rights.¹⁹³

B. The Ramifications of Expanding the Per Se Takings Category

The Court's decision struck down California's union access regulation, which allowed union organizers onto agricultural property to promote workers' rights on a state level, beyond the rights that the federal government provided to workers.¹⁹⁴ Although this decision negatively affected the California state government's ability to implement labor organization regulations, the ramifications of the *Cedar Point* decision may go far beyond the two California nurseries at the heart of *Cedar Point*.¹⁹⁵ As the dissent aptly observed, many existing regulations include access regulations because they are an effective way to inspect and regulate private property, which promotes the public good.¹⁹⁶ The new per se takings category may determine that these regulations are unconstitutional takings as well.¹⁹⁷ Moreover, the expanded per se category may dis-

¹⁹² See Asbridge, *supra* note 125, at 843–44 (observing how the Court previously differentiated between governmental regulations, which were not previously takings because of the police powers, and the state's eminent domain powers (citing *Mugler v. Kansas*, 123 U.S. 623, 667–68 (1887))).

¹⁹³ See *Cedar Point*, 141 S. Ct. at 2085–86 (Breyer, J., dissenting) (arguing that the majority cited cases that did not actually support its new understanding of per se takings regarding temporary entry onto property).

¹⁹⁴ See *id.* at 2069, 2072, 2080 (majority opinion) (determining that the regulation at issue was a taking because the state effectively took away the core property right of exclusion and gave the union authority to invade). See generally Sagle, *supra* note 5, at 140–43 (analyzing the access regulation and demonstrating how it gave more protections to agricultural laborers than federal laws afforded).

¹⁹⁵ See *Cedar Point*, 141 S. Ct. at 2080 (determining that California's regulation permitting union access onto private property was a per se taking, thereby calling into question the constitutionality of access regulations as a whole).

¹⁹⁶ See *id.* at 2087 (Breyer, J., dissenting) (using several examples of regulations designed to protect the public that the Court's decision in *Cedar Point* could deem to be takings, such as regulations permitting workplace inspections); see also Liang, *supra* note 127, at 1810, 1812 (analyzing how the Supreme Court's new per se standard means that certain provisions of the Fair Housing Act's regulations concerning anti-discrimination could be takings because they interfere with landlord property owners' exclusion rights).

¹⁹⁷ See *Cedar Point*, 141 S. Ct. at 2089 (Breyer, J., dissenting) (questioning how the Court's prescribed exceptions to the expanded per se category would protect existing governmental regulations); see also Asbridge, *supra* note 125, at 826–27 (analyzing the Court's articulation of the exceptions to the per se category and noting that the decision may threaten many governmental regulations that the government enforces by allowing temporary access onto property); Carolyn Liziewski, Recent Case, *The Supreme Court's All-or-Nothing Approach to the Right to Exclude in Cedar Point Nursery v. Hassid*, COLUM. BUS. L. REV. (Nov. 24, 2021), <https://journals.library.columbia.edu/index.php/CBLR/announcement/view/455> [<https://perma.cc/5BEF-3BD9>] (noting that the *Cedar Point* decision signals that in future disputes between private property owners and agencies invoking access regulations, the Court will likely be willing to side in favor of business owners, thereby weakening the ability of governments to regulate).

suade governmental bodies from implementing future necessary access regulations with the belief that courts may determine they are takings.¹⁹⁸

Furthermore, the Court's decision to broaden the per se takings definition could be a signal of how the Court will analyze and value other key property rights.¹⁹⁹ In *Cedar Point*, the Court determined that the right to exclude was a key, historical property right, thereby justifying its decision that any interference with the right was a per se taking.²⁰⁰ The right to exclude, however, is just one of many long-standing, important property rights, such as the right to use one's property.²⁰¹ Under the Court's new framework for per se takings, governmental interference with fundamental property rights could amount to per se takings.²⁰² Although *Cedar Point* was confined to exclusion rights, the Court's decision signals that interference with other core property rights could also risk amounting to per se takings.²⁰³ Thus, the ramifications of *Cedar Point* may go far beyond access regulations and could threaten governmental regulations that interfere with *any* fundamental property rights by deeming them to be per se takings.²⁰⁴

¹⁹⁸ See Brief of Virginia, *supra* note 12, at 3–4 (raising concerns to the Court that deciding the access regulation constituted a taking would threaten numerous state regulations permitting access onto private property).

¹⁹⁹ See *Cedar Point*, 141 S. Ct. at 2076 (determining that there was a historical basis for the right to exclude, thereby justifying the Court's decision that access regulations amounted to a per se taking); see also Liziewski, *supra* note 197 (arguing that the Court's decision marked a shift where the Court would be more willing to hold that per se takings occurred and favor private property ownership rights).

²⁰⁰ See *Cedar Point*, 141 S. Ct. at 2077 (highlighting the long-standing basis for the Court to prioritize private property owners' ability to exclude by holding infringements of this right constitute per se takings (citing *Kaiser Aetna v. United States*, 444 U.S.164, 179–80 (1979))).

²⁰¹ See di Robilant, *supra* note 36, at 880 (detailing how property scholarship determined that there are several core property rights in the bundle of rights, such as the right to use and transfer property (citing Henry T. Terry, *Legal Duties and Rights*, 12 YALE L.J. 185, 189 (1903))).

²⁰² See *Cedar Point*, 141 S. Ct. at 2076 (determining that the government's action in taking away the ability to exclude was a per se taking). The Court in *Cedar Point* reasoned that because the right to exclude was a long-lasting property right, the government could not act or regulate in a manner that essentially took away this right, without the action being a per se taking. See *id.* at 2077 (reasoning that regarding core property rights, the government could not interfere with property rights to achieve its own objectives).

²⁰³ See *id.* at 2072 (drawing a distinction between judicial doctrines for the right to exclude and the right to use property, where the latter required application of a balancing test of several policy considerations). Although the Court determined that only infringements upon the right to exclude would be a per se taking, the Court's logic and reasoning was heavily based in the historical basis for the power to exclude. See *id.* (noting the historical importance of the power to exclude and pointing out that the Court's decision in *Cedar Point* would narrow the distinction between regulation and physical invasion because regulations pertaining to the right to exclude could be per se takings).

²⁰⁴ See *id.* at 2073 (signaling that because of the historical importance of the exclusion right, infringements on it could be a per se taking); see also di Robilant, *supra* note 36, at 880 (highlighting the historical importance of several property rights, such as the ability to use one's property).

CONCLUSION

The Supreme Court critically altered the takings doctrine in its 2021 decision, *Cedar Point Nursery v. Hassid*. Prior to *Cedar Point*, the Court relied on a developed judicial doctrinal separation between the government regulating and physically taking property. With the former category, the Court engaged in a factual balancing test to determine how much the regulation interfered with core property rights. The latter category applied to more limited circumstances of actual, permanent invasion, but was categorically a per se taking. The Court's decision in *Cedar Point* reshaped this understanding of per se takings by deeming the critical point of analysis to be whether the governmental action—either temporarily or permanently—took away the core property right of exclusion by physically invading the property. Thus, the Court narrowed the separation between automatic per se takings and regulatory takings.

The Court reached this conclusion by erroneously relying on its prior precedent and consideration of the right to exclude as justification for dramatically expanding the per se takings category. The Court's reinterpretation of its prior decision in *Portsmouth II* provided a telling example of how the Court was willing to bend its precedent in order to justify applying the per se takings analysis to temporary entry onto property. Beyond the California state regulation at the core of *Cedar Point*, the Court's holding will make it more difficult for state governments to effectively regulate through accessing private property.

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