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Let the Exceptions Do the Work: How Florida Should Approach Environmental Regulation After *Cedar Point Nursery v. Hassid*

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For nearly fifty years, courts distinguished between per se physical takings and regulatory takings. Yet, in 2021, the Supreme Court signaled a change of course with the monumental Cedar Point Nursery v. Hassid *decision. The ruling challenges the government's ability to mandate anything that impacts private property. In the face of environmental catastrophe and increasing pressure to assuage our climate crisis, how can governments respond without triggering a takings challenge?*

Chief Justice Roberts in his majority decision may have left the door cracked open for governments to work around the Cedar Point Nursery *ruling. By looking at the legacy of other takings challenges, namely* Lucas v. South Carolina Coastal Council, *this Comment argues that regulators and legislators may find hope in* Cedar Point Nursery*'s implied and stated exceptions. Florida is at a heightened risk from environmental calamity and will need to rely on creative lawmaking to prevent paying out just compensation. From*

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proposed inspection regimes to wildlife protection and more, Floridian municipal and county governments rely on the temporary use of private property. This Comment proposes the ways in which Florida can still achieve progressive climate action while staying within the Supreme Court's new takings law framework.

INTRODUCTION

In June 2021, the Supreme Court found a California labor regulation that allowed union organizers on farmland 120 days a year,

but for no more than three hours a day, violated the Takings Clause.[1] The Court in *Cedar Point Nursery v. Hassid* determined that the 1975 California Agricultural Labor Relations Board's ("ALRB") Access Regulation, designed to promote union access to farmworkers by granting union organizers limited access rights to private farmland, constituted a per se physical taking, thus reversing the Ninth Circuit Court of Appeals decision.[2] Writing for the majority, Chief Justice John Roberts stated, "[w]henever a regulation results in a physical appropriation of private property, a per se taking has occurred."[3] With the per se taking ruling, California has to choose whether to pay just compensation for every invasion or invalidate the law.[4] The ruling was heralded by pro-property rights groups as a victory for individual liberties,[5] but others warned of the potential far-reaching implications of the Court's expanded takings jurisprudence.[6]

Cedar Point Nursery fits squarely in the trend of takings law claims developed by conservative groups over the past twenty years: these cases are an attempt to blur the line between physical and regulatory takings.[7] The distinction between physical and regulatory takings has become increasingly convoluted and difficult to unentangle.[8] American takings jurisprudence has long been riddled with

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[1] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2063–64 (2021). Under the applicable state law, labor organizers were allowed to enter farms before and after work and during lunch for four months of the year.

[2] *Id.*

[3] *Id.* at 2072 (emphasis omitted).

[4] Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 54 (2022).

[5] *The Supreme Court Delivers a Victory for Property Rights in Cedar Point Nursery v. Hassid*, PAC. LEGAL FOUND. (June 23, 2021), https://pacificlegal.org/supreme-court-victory-cedar-point-nursery-v-hassid/.

[6] *5-4: Cedar Point Nursery v. Hassid* (July 6, 2021) (downloaded using Spotify). Legal podcasters discuss ramifications of *Cedar Point Nursery* including future health and safety regulations.

[7] Richard Frank, *Supreme Court Finds California Labor Access Regulation Works Unconstitutional Taking of Private Property*, LEGALPLANET (June 23, 2021), https://legal-planet.org/2021/06/23/supreme-court-finds-california-labor-access-regulation-works-unconstitutional-taking-of-property/ [hereinafter Frank, *Supreme Court*].

[8] *Id.*

inconsistencies creating a complex and confusing body of case law ripe for manipulation.[9] As Justice Stevens recognized, "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[10] Libertarian activists have taken advantage of this confusion, using takings as a legal avenue to catapult more radical ideas, such as Richard Epstein's "Takings Project" which claims that "all regulations, all taxes, and all modification of liability rules are takings of private property prima facie compensable by the state."[11] In other words, no regulation without government compensation. *Cedar Point Nursery* creates yet another obfuscating layer to the takings analysis, generating more questions than answers.

For places like Florida, the impact of this decision weighs heaviest in the environmental realm. The collapse of the Champlain Towers South ("Champlain Towers") condominium in Miami's Surfside reminded South Floridians of the damage Florida's ocean environment can do when it goes unchecked.[12] But decisions like *Cedar Point* have complicated the climate change regulation calculus. While Florida cities propose public-private partnerships for building inspections in the wake of Surfside as well as government-led resilience strategies like mandatory septic to sewer conversions, *Cedar Point Nursery* challenges the state's ability to provide even temporary access to private property that would be necessary for these programs.

However, *Cedar Point Nursery* may provide an unlikely regulatory avenue for environmentalists. Much like the hotly debated and environmentally feared *Lucas v. South Carolina Coastal Council*[13] case, *Cedar Point Nursery's* exceptions for quid pro quo and unintentional invasions by government could subsume the rule entirely,

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[9] *See* Robert Meltz, *Takings Law: A Primer for the Perplexed*, 34 ECOL. Q. 307, 310 (2007).

[10] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

[11] Jon Margolis, *The Quiet Takings Project Is Trespassing on Democracy*, HIGH COUNTRY NEWS (Aug. 2, 1999), https://www.hcn.org/issues/159/5156.

[12] *See, e.g.*, John Schuppe, *Surfside Collapse Exposes an Overlooked Threat: Saltwater Rising from Underground*, NBC NEWS (Feb. 17, 2022), https://www.nbcnews.com/news/us-news/surfside-condo-collapse-salt-groundwater-rcna16473.

[13] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006 (1992).

perhaps providing environmentalists with an understated victory toward regulation. *Cedar Point Nursery* may open the door for expanded background norms and principles that allow for more proactive regulation in the name of future generations' health and safety. Regulators, however, will have to be willing to face potential legal challenges in order to test local courts' implementation of *Cedar Point Nursery*.

Part I of this Comment discusses takings law background prior to the *Cedar Point Nursery* ruling to demonstrate how *Cedar Point Nursery* departs from established cases, and explains the evolution of takings law in the conservative legal project. Part I also introduces *Lucas*, the primary model of comparison for *Cedar Point Nursery*.[14] Part II explores the background, facts, and holding of *Cedar Point Nursery* itself. It looks at the case's labor law origins and draws a connection between organized labor animus and the pro-Fifth Amendment takings sentiment on the Supreme Court that paved the way for a property owner to win in *Cedar Point Nursery*.[15] Part III looks at Florida's unique environmental position and the challenges posed because of its coastal location. From septic to sewer conversions to building maintenance, Florida cities have undertaken ambitious environmental regulation out of necessary precaution.[16] Yet, as Part IV discusses, these regulations may face a challenge from *Cedar Point Nursery*. Indeed, all of these proposals require temporary access to land, which could now be a taking. Part IV argues that while environmentalists' concerns are not unfounded, there is comfort from the *Lucas* case, despite also being labeled a death to environmental policy at the time. While *Cedar Point Nursery* may prevent temporary land entrance in the union context, the case also acknowledged and expounded on background principles creating the potential for the exceptions to swallow the rule entirely.[17] *Cedar Point Nursery* may provide an avenue for expansion of environmental policies that Florida has been unable to push on the grounds of established background principles often acknowledged and upheld by lower courts. Part V concludes the Comment and provides hope

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[14] *See* discussion *infra* Section I.
[15] *See* discussion *infra* Section II.
[16] *See* discussion *infra* Section III.
[17] *See* discussion *infra* Section IV.

for Florida's environmental future by looking to the legacy of *Lucas*, the immediacy of needed relief, and the political will of the people for environmental policy supported by the background principle idea.[18]

I. TAKINGS LAW BACKGROUND

A. *Eminent Domain and the Takings Clause: Origins of Current Jurisprudence*

Early Americans, despite political differences, agreed on the importance of property preservation.[19] Many early revolutionaries subscribed to Lockean ideas of property as being accumulated through the mixing of labor with the land.[20] Following the American Revolutionary War, revolutionaries seized loyalists' property to turn over to revolutionary fighters or to turn into public services.[21] Seizing even loyalists' land created conflict among the Lockean revolutionaries and reinforced fear of governmental intrusion into private property.[22] The Bill of Rights includes a provision dedicated to government seizures of private property.[23] The Fifth Amendment to the Constitution reads in part, "nor shall private property be taken for public use, without just compensation."[24] This phrase, known as the

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[18] *See* discussion *infra* Section IV.

[19] Dennis H. Long, Note, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 IND. L.J. 1185, 1187 (1998).

[20] Gerald Friedman, *The Sanctity of Property Rights in American History* 1, 5 (Univ. Mass. Amherst Working Paper, Paper No. 14, 2001), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1008&context=peri_workingpapers.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 22.

[24] U.S. CONST. amend. V. While the Fifth Amendment did not originally apply to state condemnation actions, the Fourteenth Amendment incorporated the Takings Clause for state governments as well. U.S. CONST. amend. XIV. Eminent domain power was viewed as an inherent right of the government, limited only by the Fifth Amendment's public use and just compensation qualifications. *History of the Federal Use of Eminent Domain*, U.S. DEP'T JUST. (May 15, 2015), https://www.justice.gov/enrd/history-federal-use-eminent-domain.

Takings Clause, is the language from which all takings jurisprudence flows.[25]

Takings suits arise from eminent domain power, or the power of the sovereign to take private property so long as it is constrained by public use and just compensation.[26] The government's condemnation authority is direct, meaning the government actively seizes the condemned property, and the government affirmatively acknowledges the property being taken while the property owner-defendant challenges the government's purpose of seizure or compensation due.[27] The Supreme Court first looked at federal eminent domain power in the late nineteenth century, when a landowner challenged the ability of the government to condemn his land so that it may build a custom house and post office on it.[28] The government's condemnation withstood the challenge, with Justice Strong explaining that the authority of the government to appropriate property for public use is "essential to its independent existence and perpetuity."[29] A few years later, the government won again when the Supreme Court upheld the use of eminent domain to condemn portions of Gettysburg Electric Railroad Company's land in order to preserve the Gettysburg Battlefield as a national site.[30]

But regulatory takings actions do not arise with the government condemning property; they rather come out of some other, indirect government action that impacts the land.[31] Indeed, this country's founders likely saw no use for the Takings Clause outside of direct condemnation claims and protecting property from unwarranted and uncompensated seizures.[32] For many years, the Fifth Amendment

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[25] Meltz, *supra* note 9, at 310.

[26] *Id.*

[27] *Id.*

[28] Kohl v. United States, 91 U.S. 367, 371 (1875). *See generally History of the Federal Use of Eminent Domain*, *supra* note 24 (providing a background on federal eminent domain law and the law's evolution).

[29] *Kohl*, 91 U.S. at 371.

[30] United States v. Gettysburg Elec. Ry., 160 U.S. 668, 679–80 (1896).

[31] Meltz, *supra* note 9, at 311.

[32] *See* Long, *supra* note 19, at 1187.

language was construed literally, only applying to physical seizures of land.[33]

B. Penn Coal *and the Birth of Regulatory Takings*

In 1922, the Supreme Court first acknowledged that the Fifth Amendment could cover more than affirmative takings in *Pennsylvania Coal Co. v. Mahon*.[34] The seminal decision marks the first time the Court recognized the idea of a regulatory taking.[35] In *Penn Coal*, the Court struck down a state law called the Kohler Act that prevented complete subsurface mining in order to avoid subsidence to above ground homes and other structures.[36] Delivering the opinion of the Court, Justice Oliver Wendell Holmes acknowledged that government could hardly go on if it had no ability to regulate, but if a regulation "goes too far it will be recognized as a taking."[37] Justice Holmes argued that the Kohler Act in this case had gone too far as it stripped the coal company of its right to mine commercially viable coal, as if the government had seized the company's assets itself.[38] While Justice Holmes was able to identify that the Kohler Act went "too far," the opinion did not provide extensive reasoning, making the ruling vague and unworkable at best.[39]

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[33] *See APA Policy Guide on Takings*, AM. PLAN. ASS'N. (April 11, 1995), https://www.planning.org/policy/guides/adopted/takings.htm; Meltz, *supra* note 9, at 311.

[34] *See generally* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[35] *See id.*

[36] *Id.* at 412–16.

[37] *Id.* at 413, 415.

[38] *Id.* at 414 ("To make it commercially impracticable to mine certain coal has nearly the same effect for constitutional purposes as appropriating or destroying it.").

[39] *See id.* at 415–16; Mark W. Cordes, *The Land Use Legacy of Chief Justice Rehnquist and Justice Stevens: Two Views on Balancing Public and Private Interests in Property*, 34 U.C. DAVIS ENVT'L L. & POL. J. 1, 7–8 (arguing that the Court failed to establish any guidance but merely acknowledged not all diminutions in value are enough to become a taking while simultaneously opening the door to regulatory challenges).

It was Justice Brandeis in dissent who articulated what would soon become the guide for regulatory takings: conceptual severance.[40] Brandeis, the lone dissenter, articulated his reasoning in three parts.[41] Brandeis expanded on Holmes's diminution of value statement by arguing the value of coal lost should not be calculated as just the regulated amount of coal, but instead as a percentage of the total value of the land.[42] While Justice Brandeis was by himself in his *Penn Coal* dissent, conceptual severance has evolved into "parcel as a whole" takings doctrine and created an entirely new denominator problem for regulatory takings.[43]

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[40] *Pennsylvania Coal Co.*, 260 U.S. at 419 (Brandeis, J., dissenting). Conceptual severance does not become the entirety of regulatory takings doctrine, but rather provides a guideline for the regulatory rule articulated in 1978 of the Penn Central three-factor test. Brandeis' dissent becomes the basis of this three-factor text discussed later in this note.

[41] *Id.*

[42] *Id.*

> It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value; and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. . . . And why should a sale of underground rights bar the State's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute.

Id.

[43] *E.g.*, Andrew C. Gresik, *Blurring the Denominator:* Murr v. Wisconsin *and the Increasing Complexity of Takings Analysis*, 2018 WIS. L. REV. 1231, 1235 (2018); Laura J. Powell, *The Parcel as a Whole: Defining the Relevant Parcel in Temporary Regulatory Takings Cases*, 89 WASH. L. REV. 151, 157 (2014) (explaining that correctly identifying the parcel bounds is a problem in itself); *see* Cordes, *supra* note 39, at 11.

C. *Regulatory Takings Refined*

Prior to *Penn Coal*, the Supreme Court acknowledged an implicit "public benefit" versus "private harm" test rooted in nuisance law in *Mugler v. Kansas*.[44] *Mugler* represents one of the Court's earliest rulings on noxious use.[45] The plaintiffs operated a brewing business, which had been outlawed by the Kansas legislature.[46] In upholding the Kansas law, the Supreme Court held there was a difference in police action to abate nuisance and physically invading property, grounding the analysis "upon the fundamental principle that everyone shall so use his own as not to wrong and injure another."[47] Yet, *Penn Coal* moved away from harm versus benefit analysis to an economics approach and thus rendered nuisance a reactive rather than proactive doctrine.[48]

The Court was silent on regulatory takings for many years after the *Penn Coal* decision leaving no clear path forward.[49] That silence ended in 1978 when the Supreme Court decided its most impactful and enduring regulatory takings case, *Penn Central Transportation Co. v. New York City*.[50] *Penn Central* ushered in a new era of regulatory takings jurisprudence—redefining what a regulatory taking could be.[51]

Penn Central involved a challenge to New York City's Landmark Preservation Law and its application to Grand Central Station.[52] The Landmark Preservation Commission recognized Grand Central Station as a landmark, requiring the Commission to approve all exterior changes to the building.[53] Penn Central, the owner of

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[44] Mugler v. Kansas, 123 U.S. 623, 660–61 (1887).

[45] Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 501 VAND. L. REV. 1449, 1458 (1997).

[46] *Mugler*, 123 U.S. at 656–57.

[47] *Id.* at 667.

[48] *See* Oswald, *supra* note 45, at 1462–65.

[49] *Id.* at 1490.

[50] *See id.*; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[51] *See* Cordes, *supra* note 39, at 9. Cordes offers a discussion on how the appointment of both Chief Justice Rehnquist and Justice Stevens corresponds with the rise of regulatory takings law cases heard by the Supreme Court.

[52] *Penn Cent. Transp. Co.*, 438 U.S. at 113–20.

[53] *Id.*

Grand Central Station, proposed two alternative plans, both with significant, unattractive height additions to the Grand Central façade.[54] The Commission rejected the proposals as they would denigrate the landmark's aesthetics, giving rise to Penn Central's claim that the Commission had so severely limited its air rights that its landmark designation had effectuated a taking.[55]

The Supreme Court found New York City's Landmark Preservation Law constitutional.[56] The Court also acknowledged the shortcomings of *Penn Coal*'s holding.[57] *Penn Central* expanded Justice Brandeis's conceptual severance idea, turning it instead into a three-part balancing test.[58] Justice Brennan, writing for the majority, explained the Court's rationale stating:

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether the rights in a particular segment have been abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather on the . . . extent of the interference with rights in the parcel as a whole.[59]

First, the Court weighed the economic impact of the regulation.[60] Next, the Court looked to the nature of the government action.[61] Finally, the Court evaluated the reasonable investment backed expectations of the property owner.[62]

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[54] *Id.* The first plan, called Breuer I after the architect who designed it, called for the construction of a fifty-five-story office building over the existing Beaux-Arts style façade. The second plan, Breuer II, called for tearing down some of the existing façade, stripping down the existing features, and building a fifty-three-story office building in its place.

[55] *Id.* at 117 ("[T]o protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off.").

[56] *Id.* at 138.

[57] *Id.* at 127.

[58] *See id.* at 124–25.

[59] *Id.*

[60] *Id.* at 128–31.

[61] *Id.* at 131–32.

[62] *Id.* at 132–36.

Penn Central's ad hoc balancing test has come under increased criticism in recent years with detractors categorizing the test as too nebulous.[63] Some have called for abandoning the test completely.[64]

Justice Rehnquist, in dissent, harkened back to *Mugler* arguing that he would find the Landmark Preservation Law a taking unless it was the nuisance exception.[65] Nevertheless, for now, *Penn Central* remains the metric against which all regulatory takings are measured.[66]

D. *A Category unto Its Own: Physical Takings*

As regulatory takings decisions began to see the light of day in the Supreme Court, so too did a different analysis of government action.[67] In 1982, the Court declared a new rule: when the government mandates a permanent physical intrusion onto private property, a per se taking has occurred.[68] Justice Marshall articulated this rule in the 1982 case *Loretto v. Teleprompter Manhattan CATV Corporation*.[69] In *Loretto*, the Court examined a City of New York regulation, which stated that apartment building owners could not interfere with the installation of cables on their buildings.[70] This regulation required the placement of a four by four inch box along with cables on the roof of Loretto's building.[71] The owner brought suit claiming that the physical occupation of the building was a government taking.[72]

The Supreme Court agreed, ruling that the permanent physical occupation of a property "forever denies the owner any power to

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63 Powell, *supra* note 43, at 157.

64 *See id.* at 157.

65 *Penn Cent. Trans. Co.*, 438 U.S. at 145 (Rehnquist, J., dissenting).

66 Powell, *supra* note 43, at 157–58. Until *Cedar Point Nursery*, regulatory takings are evaluated using the *Penn Central* ad hoc balancing test unless the taking falls into a *per se* category.

67 Daniel A. Farber, Murr v. Wisconsin *and the Future of Takings Law*, 2017 SUP. CT. REV. 115, 116 (2017) [hereinafter Farber, *Future of Takings Law*].

68 *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).

69 *Id.*

70 *Id.* at 421–24.

71 *Id.*

72 *Id.* at 438–39

control the use of the property."[73] The result of *Loretto* is a much neater rule than *Penn Central*: whenever the government permanently invades private property, no matter how minute the intrusion, a taking has occurred.[74]

Loretto established a per se rule for permanent physical invasions. The Court distinguished the permanent placement of the cable box from other temporary invasions such as easement access or handing out flyers.[75] Justice Marshall characterized temporary physical invasions as "property restrictions of an unusually serious character for purposes of the Takings Clause."[76] Nevertheless, temporary invasions fell under the purview of *Penn Central*'s balancing factors.[77]

E. *The Per Se Revolution?* Lucas v. South Carolina Coastal Council

Nearly ten years after *Loretto*, the idea of the Takings Clause expansion had taken root.[78] New federal justices like Antonin Scalia, who agreed with Epstein's takings philosophy, were eager to create bright-line rules for takings cases like the per se physical invasion rule.[79] In 1992, Justice Scalia wrote a takings law decision

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[73] *Id.* at 436.

[74] *See id.*

[75] *Id.* at 433–34 (discussing Kaiser Aetna v. United States, 444 U.S. 164 (1979) and PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)); *see also* Meltz, *supra* note 9, at 362–63.

[76] *Loretto*, 458 U.S. at 433.

[77] *Id*. at 433–34; Meltz, *supra* note 9, at 362–63. Meltz discusses Federal circuit cases of temporary takings that towed the line between permanent invasions and temporary occupations by the government. Of note, Meltz highlights that Federal courts considered both time of invasion and purpose when determining the extent of a temporary physical invasion. For an example of this analysis applied, see Boise Cascade Corp. v. United States, 296 F.3d 1339, 1356 (Fed. Cir. 2002).

[78] Margolis, *supra* note 11.

[79] Farber, *Future of Takings Law*, *supra* note 67, at 116. Justice Antonin Scalia was perhaps the Court's primary crusader for the property movement. While he was joined by Justice Clarence Thomas, Scalia's movement appeared to stall after the apparent *Lucas* victory. For more on Justice Scalia and the brightline takings movement, see Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 Hastings L.J. 759, 760 (2006).

that property rights advocates believed would revolutionize Fifth Amendment jurisprudence forever.[80] Libertarian groups hailed the Court's decision in *Lucas v. South Carolina Coastal Council* as finally operationalizing takings law as a vehicle of deregulation.[81]

David Lucas, a real estate developer in Charleston, South Carolina, purchased two residential lots on an island off the South Carolina coast with hopes of turning the lots into single family homes for sale.[82] After Lucas purchased the homes, South Carolina's government passed the Beachfront Management Act, which prevented new development on the island due to high erosion risk.[83] Lucas claimed that his two beachfront lots were now rendered completely useless by the government's action.[84]

Justice Scalia, relying primarily on dicta from previous takings cases, molded a new per se rule.[85] The new rule stated "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[86] This new per se rule became known as "total takings" or "no economically beneficial use."[87]

Yet Scalia's *pièce de resistance* was imperfect.[88] Earlier cases had acknowledged the government's ability to regulate property to an extreme degree if public safety was involved and beach erosion seemed facially like a public safety issue.[89] Justice Scalia created a carve out in his per se rule to deal with this fallacy: a regulation restricting all economically beneficial use of a property is legal only if the law "do[es] no more than duplicate the result that could have

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80 Daniel Farber, *Requiem for a Heavyweight: The Decline and Fall of* Lucas v. South Carolina Coastal Council, 71 FLA. L. REV. F. 212, 212 (2020) [hereinafter Farber, *Requiem for a Heavyweight*].

81 *Id.* (citing Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1165 (2019)).

82 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006 (1992).

83 *Id.* at 1008.

84 *Id.* at 1009.

85 Farber, *Requiem for a Heavyweight*, *supra* note 80, at 213.

86 Lucas, 505 U.S. at 1019.

87 Farber, *Requiem for a Heavyweight*, *supra* note 80, at 213.

88 *See id.*

89 *See id.*

been achieved in the courts–by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public, generally or otherwise."[90]

It was Justice Kennedy in concurrence, however, who would leave the greater legacy on total takings background principles.[91] Kennedy disagreed with Scalia's narrow common law approach and instead favored background principles informed by statutes as well.[92] Years later in *Murr v. Wisconsin*, Kennedy wrote the majority opinion and cited his own concurrence, upholding a government regulation, writing "[c]oastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."[93]

While Scalia did succeed in drafting another per se category in addition to permanent physical occupation, it was Justice Kennedy's approach to total economic loss that was adopted by many lower courts.[94]

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[90] Lucas, 505 U.S. at 1029.

[91] Farber, *Requiem for a Heavyweight*, *supra* note 80, at 214.

[92] Lucas, 505 U.S. at 1035 (Kennedy, J., concurring)

> We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found."; "The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment.

Id.

[93] Murr v. Wisconsin, 137 S. Ct. 1933, 1946 (2017) (quoting Lucas, 505 U.S. at 1035). *Murr* posed a denominator problem unlike *Cedar Point*, yet Kennedy's attention to the unique needs of coastal properties gave extra fodder to expanding background principle arguments. By providing distinct consideration for environmentally vulnerable lands, Kennedy gave life to the harm/benefit concept first expressed in *Mugler*.

[94] Farber, *Requiem for a Heavyweight*, *supra* note 80, at 214. For a greater discussion on how background principles changed the impact of *Lucas*, see also Robert R. Glicksman, *Swallowing the Rule: The Lucas Background Principles*

II. CEDAR POINT NURSERY V. HASSID

A. *How did we get here? The Legacy of César Chávez, Labor Rights, and the Takings Project*

Almost thirty years after the *Lucas* decision, the libertarian project again turned towards expanding takings law and using the Fifth Amendment as a weapon against regulation.[95] Pacific Legal Foundation[96] carefully selected the *Cedar Point Nursery* plaintiffs.[97] The case quickly moved through the lower courts with the plaintiffs showing no tangible injury and foregoing other labor and due process claims that may have granted the plaintiffs adequate relief to fast-track litigation to the Roberts Supreme Court.[98]

Cedar Point Nursery centers around a labor regulation.[99] The plaintiffs brought a challenge over a longstanding California Labor

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Exception to Takings Liability, 71 FLA. L. REV. F. 121, 121 (2020) and Blumm & Wolfard, *supra* note 81, at 1165. The discussion *infra* Section III of this comment also explores how background principles continue to resurface and reshape takings law claims.

[95] *See* Sam Spiegelman & Gregory C. Sisk, *Cedar Point: Lockean Property and the Search for Lost Liberalism*, 2021 CATO SUP. CT. REV. 165, 165 ("[T]he Supreme Court heard a case with the potential to (finally) move regulatory-takings doctrine in a coherent direction.").

[96] *About Us*, PAC. LEGAL FOUND. (2022), https://pacificlegal.org/about/ (last visited Sept. 9, 2022). Pacific Legal Foundation is the same legal group that had brought *Nollan v. California Coastal Commission* nearly twenty-five years earlier. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) was a takings challenge over government exactions for development and redevelopment. The Court found that there had to be an essential nexus in order for the exaction to not constitute a taking.

[97] Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L. J. F. 141, 156 (2021).

[98] *Id.* (citing Brief of Senators Sheldon Whitehouse, Jeff Merkley, Richard Blumenthal, Cory Booker, and Alex Padilla, in Support of Respondents at 3–12, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2020) (No.20–107)). Senator Whitehouse, in support of the California regulation, quotes the district court stating that plaintiffs "fail[ed] to allege facts in their pleadings that suggest that the Access Regulation has had any negative economic impact on them at all . . . . Petitioners never sought to prove otherwise." Cedar Point Nursery v. Gould, No. 116CV00185LJOBAM, 2016 WL 3549408, at *4 (E.D. Cal. Apr. 18, 2016).

[99] Elizabeth Whitman, Cedar Point Nursery v. Hassid – *A Labor Law Case That Could Affect Eviction Moratoriums*, JDSUPRA (Sept. 20, 2021), https://www.jdsupra.com/legalnews/cedar-point-nursery-v-hassid-a-labor-

Law that traces its roots back to the activism of César Chávez and Dolores Huerta.[100] In the 1960s, California's United Farm Workers began to strike, demanding better wages and working conditions for agricultural workers.[101] In response, California passed the California Agricultural Labor Relations Act.[102] This landmark labor law granted union organizers, among other things, temporary limited access to agricultural workplaces to speak with laborers and prevent exploitation.[103] The law faced legal obstacles when it was initially implemented, with farm owners bringing a takings law challenge in California state court in 1976.[104] The California Supreme Court upheld the Access Regulation and, notably, the U.S. Supreme Court dismissed the farmer's appeal "for want of a substantial federal question."[105]

Almost fifty years later, Michael Fahner, the owner of Cedar Point Nursery, brought a new takings claim after United Farm Workers began exercising their access rights to his farm under the 1975 labor law.[106] Fahner asserted that the union organizers showed up with blowhorns, disturbing work hours—although a representative from United Farm Workers said the blowhorns shown on a video Fahner's presented, actually capture workers going on strike.[107] The California Labor Relations Board investigated

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8023603/. The Roberts Court has been criticized for bringing back *Lochner* Era opinions and disfavoring labor rights. In *Janus v. AFSCME*, the Court undid significant bargaining power for private sector unions. The *Janus* decision even invokes the "liberty to contract" language that the *Lochner* Era was famous for. For a greater discussion, see Mark Joseph Stern, *A New Lochner Era*, SLATE (June 29, 2018, 4:01 PM), https://slate.com/news-and-politics/2018/06/the-lochner-era-is-set-for-a-comeback-at-the-supreme-court.html.

100 Mark Joseph Stern, *The Supreme Court's Latest Union-Busting Decision Goes Far Beyond California Farmworkers*, SLATE (June 23, 2021, 1:57 PM), https://slate.com/news-and-politics/2021/06/supreme-court-union-busting-cedar-point-nursery.html.

101 *Id.*

102 *Id.*

103 *Id.*

104 Agric. Lab. Rels. Bd. v. Superior Ct., 16 Cal. 3d 392, 392 (1976).

105 Kubo v. Agric. Lab. Rels. Bd. of Cali., 429 U.S. 802, 802 (1976).

106 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2066 (2021).

107 Nina Totenberg, *High-Stakes Supreme Court Clash Between Growers, Farmworkers Could Blow Up Other Laws*, NPR (Mar. 22, 2021, 5:00 AM),

Fahner's claim of union violations, but found no evidence the union had acted wrongly.[108] After Fahner and a similarly situated farmer acquired Pacific Legal Foundation as legal representation, *Cedar Point Nursery* proceeded as a takings challenge up to the Supreme Court.[109]

Cedar Point Nursery involves two corporate growers, Fahner's strawberry farm on the California-Oregon border and Fowler Packing in Fresno, California.[110] The corporate growers claimed that California's Access Regulation creates involuntary easements onto their property and thus qualify as physical occupations of the land.[111] The far-reaching implications of Pacific Legal Foundation's Takings Clause interpretation inspired different amicus briefs.[112] The Trump administration wrote a brief asking the Supreme Court to grant certiorari for *Cedar Point Nursery* while endorsing the idea that California's labor regulation should be treated as a per se taking.[113] To further illustrate the political divide underwriting takings jurisprudence, when President Biden came into office, his administration withdrew the Trump position and encouraged the Court to leave California's law intact.[114]

Both the District Court for the Eastern District of California and the Ninth Circuit Court of Appeals declined to apply a per se test to California's Access Regulation.[115] Instead, both courts used the *Penn Central* three-factor balancing test for evaluating regulatory

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https://www.npr.org/2021/03/22/979548829/high-stakes-supreme-court-clash-between-growers-farmworkers-could-blow-up-other-.

108 *Id.*

109 *See id.*

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

111 *Id.* at 2070.

112 *See* Totenberg, *supra* note 107.

113 Andrew Storm, *In Cedar Point, Will the Supreme Court Rewrite the Fifth Amendment?*, ONLABOR (Jan. 27, 2021), https://onlabor.org/in-cedar-point-will-the-supreme-court-rewrite-the-fifth-amendment/.

114 Richard Frank, *A Preview: A Major Property Rights Case Currently Before U.S. Supreme Court*, LEGALPLANET (Mar. 21, 2021), https://legalplanet.org/2021/03/21/a-preview-major-property-rights-case-currently-before-u-s-supreme-court/ [hereinafter Frank, *A Preview*].

115 Cedar Point Nursery, 141 S. Ct. at 2070; Cedar Point Nursery v. Shiroma, 923 F.3d 524, 533 (9th Cir. 2019); Cedar Point Nursery v. Gould, No. 116CV00185LJOBAM, 2016 WL 3549408 *1, *3–4 (Apr. 18, 2016).

takings and found that the Access Regulation was not a regulatory taking.[116] In explaining the decision to use the *Penn Central* factors, the Circuit Court wrote that the Access Regulation could not constitute a physical taking as it "did not allow random members of the public to unpredictably traverse [the growers'] property 24 hours a day, 365 days a year," and it similarly did not deny all economically beneficial use of the property.[117] The Supreme Court granted certiorari soon after the Ninth Circuit denied a rehearing en banc.[118]

At oral argument, Justice Brett Kavanaugh raised his concerns that every physical intrusion onto land could not be deemed a per se taking, as the petitioners requested, without essentially crippling every facet of government.[119] Justice Barrett also mused about how much just compensation would be for such physical intrusions offering fifty dollars for intrusion, which would quickly become prohibitive for government or the unions.[120] The petitioners did not ask for compensation in this case though, but rather simply for injunctive relief, meaning they wanted the California law stricken and the new per se rule instated.[121]

Chief Justice Roberts, writing for the six-three majority (which included the once-hesitant Kavanaugh and Barrett), parted with the traditional understanding of takings law and built a new per se category just as the farm owners had asked.[122] *Cedar Point Nursery* stands for the rule that whenever a regulation results in a physical appropriation of private property, even if only an intermittent occupation or occupation by a third party, a per se, compensable taking has occurred.[123] Roberts stated the Access Regulation eliminates the growers' "right to exclude," thus violating the most prestigious right

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116 *Shiroma*, 923 F.3d at 533; *Gould*, 2016 WL 3549408 at *1, *3–4.

117 *Shiroma*, 923 F. 3d at 530–31.

118 *Cedar Point Nursery*, 141 S. Ct. at 2071.

119 Ian Millhiser, *The Supreme Court Confronts a Union-busting Argument That's Too Radical Even for Kavanaugh*, VOX (Mar. 22, 2021, 2:20 PM), https://www.vox.com/2021/3/22/22344399/supreme-court-cedar-point-nursery-hassid-union-busting-california-brett-kavanaugh.

120 Stern, *supra* note 100.

121 *Id.*

122 *Cedar Point Nursery*, 141 S. Ct. at 2071–74.

123 *See id.*

of property.[124] Drawing parallels to *Loretto*, the opinion states that even *de minimis* physical invasions are per se takings.[125] Therefore, the California ALRB Access Regulation allowing United Farmworkers onto California farms was an uncompensated per se taking.[126]

Justice Breyer, in dissent, pointed out just how far from precedent the majority's ruling takes Takings Law.[127] Breyer noted that the Access Regulation had not "appropriated" anything from the growers but merely "regulate[d] the employers' right to exclude others."[128] Breyer also focused on the nature of *temporary* versus *permanent* invasions when applying the per se rule, arguing that *Loretto* was only meant to apply to the latter, which *Cedar Point Nursery* is not.[129] While Breyer's dissent reads as a point for point debate between the minority and majority viewpoints, legal scholars have been quick to point out that blurring the lines between permanent and temporary physical invasions, as well as physical invasions to regulatory takings, is the point of the conservative takings movement.[130] As Professor of Environmental Practice Richard Frank puts it:

> [P]roperty-owners–recognizing that their chances of prevailing increased if they could characterize their claim as a physical taking–worked hard and creatively to squeeze their lawsuit into the 'physical occupation' analytical box. Over the past 20 years, conservative Supreme Court majorities have in a number of decisions increasingly accommodated that strategy.[131]

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124 *Id.* at 2072.
125 *Id.*
126 *Id.* at 2074.
127 Frank, *Supreme Court*, *supra* note 7.
128 Cedar Point Nursery, 141 S. Ct. at 2081, 2084 (Breyer, J., dissenting).
129 *Id.* at 2084.
130 *See generally* Frank, *Supreme Court*, *supra* note 7.
131 *Id.*

The result is an increasingly undistinguishable and unworkable body of caselaw.[132]

Breyer also noted the fears reflected by environmentalists, labor groups, and other regulators as *Cedar Point Nursery* worked its way through the courts.[133] Breyer stated that over eighty percent of Americans live in urban areas, requiring different forms of regulation.[134] Nearly every facet of community life requires some sort of regulation and inspection process such as food product inspection, licensing requirements, and coastal wetland monitoring.[135] If the rule in *Cedar Point Nursery* were to be applied evenly, all of these government invasions into private property would create compensable takings claims.[136]

Roberts, in response to Breyer's—and arguably the public at large's—concerns, included exceptions to the rule in the majority opinion.[137] Roberts worked hard to surmount the challenges leveled by Breyer that this new rule would undo practically all ability of the government to regulate.[138] First, Roberts asserted the *Cedar Point Nursery* decision does nothing to displace common law trespass as a remedy for isolated physical invasions.[139] Second, he argued that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property."[140] Roberts declared nuisance, much like Scalia did in *Lucas*, reasonable Fourth Amendment searches, and private or public necessity as acceptable under this new per se

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132 *See id.*

133 *Cedar Point Nursery*, 141 S. Ct. at 2088–89 (Breyer, J., dissenting). During the period *Cedar Point* was being decided, many legal and news articles were written about the potential ramifications of this decision. While facially a labor law case, Supreme Court writers feared that the anti-union sentiments of the Court and the new six-three majority made this case the perfect tester for a deeper dive into property deregulation. Mark Stern's article, *supra* note 100, captures the fear of many different practitioners after this case was decided. Likewise, Frank, *A Preview*, *supra* note 114, provides insight from a legal scholar.

134 *Cedar Point Nursery*, 141 S. Ct. at 2088 (Breyer, J., dissenting).

135 *Id.* at 2089.

136 *Id.*

137 *Id.* at 2078–80 (majority opinion).

138 *See id.*

139 *Id.* at 2078.

140 *Id.* at 2079.

rule.[141] For example, a person entering property to avoid imminent public disaster or harm to land or chattels would not raise a takings concern.[142] Finally, the government may also require property owners to cede access rights as a condition of benefits, similar to exactions of rough proportionality.[143] This framework, Roberts argues, should allow for a quid pro quo sort of arrangement where the government gets access to the property to inspect it in exchange for the landowner receiving a permit or something else desirable from the government.[144]

Yet, Chief Justice Roberts's caveats did not end there. While those may be the three he explicitly lays out, Roberts also has to address a particularly troublesome case with facts closely related to *Cedar Point*, creating another caveat.[145] In *PruneYard Shopping Center v. Robbins*, the Supreme Court, applying the *Penn Central* factors, recognized the right for groups to leaflet at a privately owned shopping center.[146] Roberts distinguishes this case, saying that this new per se rule only applies to private property not generally open to the public.[147]

III. FLORIDA'S COASTAL VULNERABILITY AND THE NECESSITY OF PHYSICAL INVASIONS FOR PRESERVATION

Between the outcries of further ideological divide on the Court and fear over the future of migrant laborers' ability to access unions (and thereby receive higher wages and better working conditions),[148] another area of concern is how this new per se approach would impact environmental regulation.[149] Many environmental

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141 *Id.*

142 *Id.* (citing Restatement (Second) of Torts §196, §197 (AM. L. INST. 1964))

143 *Id.* at 2079–80.

144 *Id.*

145 *See id.* at 2084 (Breyer, J., dissenting).

146 *Id.* at 2076 (majority opinion) (recalling the facts and decision in Pruneyard Shopping Cen. v. Robbins, 447 U.S. 74 (1980)).

147 *Id.* at 2076–77.

148 Stern, *supra* note 100.

149 *Id.*

monitoring programs require field-gathered samples and inspections, done through physical occupation of a piece of property.[150] For example, Florida requires daily turtle nesting surveys to be conducted by a Florida Fish and Wildlife Conservation Commission official for coastal construction during sea turtle nesting season.[151]

Florida tops *The Hill*'s list of states most vulnerable to climate change,[152] with *Scientific American* labeling Miami as the most vulnerable coastal city worldwide.[153] Sea levels in Florida have been rising almost one inch per decade, and heavy rainstorms and tropical depressions are becoming more frequent and devastating, as infrastructure increasingly fails to keep up with the demands of flooding.[154] Scientists predict that the southern third of the state could be underwater by the year 2100 while parts of Miami could become submerged even sooner.[155] It is no wonder that resiliency and infrastructure have become common buzzwords among Miami politicians and in climate readiness plans.[156] For instance, Miami-Dade's Climate Action Strategy centers around retrofitting buildings, sus-

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[150] *See generally Office of Resilience and Coastal Protection*, FLA. DEP'T ENV'T PROT., https://floridadep.gov/rcp (last visited Jan. 4, 2022).

[151] Fla. Stat. §§ 161.053, 379.2431(1)(f), (g) (2022); *see FWC Marine Turtle Conservation Handbook*, FLA. FISH & WILDLIFE COMM'N. (2016), https://myfwc.com/media/3133/fwc-mtconservationhandbook.pdf.

[152] Austa Somvichian-Clausen, *The U.S. States Best and Least Positioned to Take on Climate Change*, THE HILL (Nov. 26, 2020), https://thehill.com/changing-america/sustainability/climate-change/527644-the-us-states-best-and-least-positioned-to.

[153] Daniel Cusick, *Miami Is the "Most Vulnerable" Coastal City Worldwide*, SCI. AM. (Feb. 4, 2020), https://www.scientificamerican.com/article/miami-is-the-most-vulnerable-coastal-city-worldwide/; *see also* Somvichian-Clausen, *supra* note 152.

[154] Stephanie Parker, *How Climate Change Has Affected Each State*, STACKER (Oct. 19, 2021), https://stacker.com/stories/21974/how-climate-change-has-affected-each-state.

[155] *Id.*

[156] *See, e.g.*, *Climate Action Strategy*, MIAMI-DADE COUNTY, https://www.miamidade.gov/global/economy/resilience/climate-strategy/home.page (last visited Jan. 4, 2022); RESILIENT 305, https://resilient305.com/ (last visited Jan. 4, 2022).

tainable transportation increases, and waste and water management.[157] This program, among other similar resilience strategies, is under threat by the *Cedar Point Nursery* ruling.

A. *Surfside Condo Collapse and Saltwater Intrusion*

In 2021, Florida's unique climate vulnerability was on national display.[158] The coastal condominium Champlain Towers in Surfside, Florida crumbled to the ground in the middle of the night, trapping and killing ninety-seven residents.[159] While the initial reports were inconclusive, architects and engineers believe that the building's collapse was at least partially due to saltwater intrusion eating away at its steel-reinforced concrete structure.[160] Champlain Towers was built directly overlooking the water, meaning the building itself had borne the brunt of Florida's harsh storm winds bringing in saltwater off the waves.[161] Saltwater intrusion, left unchecked, can be incredibly dangerous, causing the formation of holes in concrete as well as beam displacement. Before the condo collapsed, residents had complained of pool leakage and cracks in the building's concrete, especially in its parking garage.[162]

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[157] *Miami-Dade Climate Action Strategy*, MIAMI-DADE COUNTY (Dec. 2021), https://www.miamidade.gov/green/library/climate-action-strategy-final-draft.pdf.

[158] Aditi Sangal, Meg Wagner, Melissa Macaya, & Mike Hayes, *Search Continues After Surfside Collapse Site Demolition*, CNN (July 5, 2021 at 4:11 PM), https://www.cnn.com/us/live-news/miami-florida-building-collapse-07-05-21/index.html.

[159] Annika Kim Constantino, *Death Toll Rises to 97 in Surfside Condo Collapse; Judge Approves Sale of Site*, CNBC (July 15, 2021, 2:45 PM), https://www.cnbc.com/2021/07/15/death-toll-rises-to-97-in-surfside-condo-collapse-judge-approves-sale-of-site.html.

[160] *See* Timothy H. Dixon, *Surfside Collapse: How Safe Are Our Coastal Buildings?*, THE HILL (July 9, 2021 at 1:00 PM), https://thehill.com/opinion/energy-environment/562263-surfside-collapse-how-safe-are-our-coastal-buildings.

[161] *See* Tina Gerhardt, *The Surfside Condo Collapse and Its Environmental Warning Signals*, ECOWATCH (June 30, 2021, 4:57 AM), https://www.ecowatch.com/surfside-condo-collapse-environmental-signals-2653603788.html.

[162] Jim DeFede, *Condo Collapse: Former Maintenance Manager William Espinosa Was Concerned About Saltwater Intrusion*, CBS MIAMI (June 20, 2021, 6:00 AM), https://miami.cbslocal.com/2021/06/20/condo-collapse-former-maintenance-manager-william-espinosa-was-concerned-about-saltwater-intrusion/.

Several months after the collapse, a grand jury under Miami-Dade State Attorney Katherine Fernandez Rundle issued a report on the Champlain Towers collapse complete with recommendations for moving forward.[163] The grand jury's overwhelming proposal was to increase condominium inspections and shorten the recertification time frame from forty years to fifteen to twenty years.[164] The grand jury floated the idea that the buildings should be inspected for recertification every three years, as was once City of Miami law.[165] The grand jury suggested hiring highly trained building inspectors, perhaps even through private-public partnerships with qualified structural engineers. They would carry out the detailed recertification process, which, although only every decade or so, is an incredibly detail-oriented process, requiring the inspector to spend many days in the building.[166] The report also suggested a mechanism for inspection based on resident complaints to the condominium board.[167]

Yet, all of these proposals may potentially be unworkable under *Cedar Point Nursery*'s per se rule.[168] Chief Justice Roberts recognized carve outs for reasonable searches within his majority opinion, but he limited those searches to Fourth Amendment searches and seizures.[169] Roberts also made an exception for permitting, stating the government could enter a private residence in exchange for the property owner receiving a benefit.[170] The devastation of the Surfside collapse for example, demonstrates that building inspections could fall under a public benefit or necessity rationale. The real danger of *Cedar Point Nursery* is within its rule's ambiguity. A recerti-

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[163] Greg Allen, *Grand Jury Report on Surfside Condo Collapse Calls for Immediate Action*, NPR (Dec. 16, 2021), https://www.npr.org/2021/12/16/1064751758/grand-jury-report-on-surfside-condo-collapse-calls-for-immediate-action.

[164] FINAL REPORT OF THE MIAMI-DADE COUNTY GRAND JURY: SPRING TERM A.D. 2021 (Dec. 15, 2021), https://miamisao.com/wp-content/uploads/2021/12/GRAND-JURY_202112151434-1.pdf.

[165] *Id.* at 5.

[166] *Id.* at 7.

[167] *Id.* at 8.

[168] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021).

[169] *See id.* at 2078.

[170] *See id.* at 2079.

fication process is not the same as an initial permit, and an inspection mechanism to investigate building degradation due to saltwater intrusion certainly does not provide any clear permitting benefit to the private party.[171] While there is a clear risk to letting buildings go unchecked, the danger may not be obvious until something devastating occurs.[172]

Simply put, the shortsightedness of the *Cedar Point Nursery* ruling facially puts a limit on the government's ability to regulate away another tragedy.

B. *Flooding and Water Pollution: Septic to Sewer Conversions*

Florida is similarly susceptible to flooding.[173] Most of the state lies at or near sea level, meaning increases in rainfall, for example, create dangerous flooding conditions.[174] Further, much of the state's water drainage infrastructure is ill-equipped to deal with the phenomenon of rapid downpours creating flash floods that inundate entire communities.[175] Flooding can be dangerous for many reasons, but one major reason in Florida is the amount of homes with septic systems.

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[171] *Recertification of Real Estate Property*, MIAMI DADE PROPERTY APPRAISER (last visited Jan. 4, 2022), https://www.miamidade.gov/pa/property_recertification.asp.

[172] *See* Defede, *supra* note 162.

[173] Emily L. Mahoney & Zachary T. Sampson, *Florida Has Thousands More Properties with High Flood Risk Than FEMA Says, According to New Study*, TAMPA BAY TIMES (June 29, 2020), https://www.tampabay.com/news/environment/2020/06/29/florida-has-thousands-more-properties-with-high-flood-risk-than-fema-says-according-to-new-study/.

[174] *Florida Coastal Flooding*, STATES AT RISK, https://statesatrisk.org/florida/coastal-flooding (last visited Aug. 15, 2022).

[175] Daphne Chen, Jennifer Borresen, & Josh Salman, *'Sewer Crisis in the State of Florida,'* JACKSONVILLE.COM (April 13, 2019, 6:54 PM), https://www.jacksonville.com/story/special/special-sections/2019/04/13/x2018-sewer-crisis-in/5438905007/.

Septic tanks, particularly in South Florida, have become a major source of groundwater pollution.[176] South Florida's sandy soil allows runoff from septic tanks to flow quickly, without the dispensing of nitrogen pollutants, which creates toxic algal blooms.[177] Moreover, Florida's low-lying surface prevents the drainage separation from meeting the Environmental Protection Agency's minimum drainage separation recommendation of three to four feet between the bottom of a septic system's drain field and the water table.[178] Most Floridian septic tanks have drainage separation of only two feet or less, and as sea levels continue to rise that distance shrinks, meaning the odds of sewage backups increase.[179] In 2016, Florida passed the Springs and Aquifer Protection Act, which identified thirty "Outstanding Florida Springs" requiring additional water protections to ensure conservation efforts.[180] The act identified nitrogen as the primary cause of spring pollution.[181] Studies of those springs have found that septic tanks are one of their largest nitrogen dispositors.[182]

Florida municipalities have thus attempted to move residents from septic to sewer systems through both incentives and mandates.[183] The 2000 Florida State Legislature mandated that the Flor-

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[176] Brendan Rivers, *Sandy Soil and Rising Seas Spell Septic Tank Disaster in Florida*, JACKSONVILLE TODAY (June 27, 2019, 9:04 AM), https://adaptflorida.org/sandy-soil-and-rising-seas-spell-septic-tank-disaster-in-florida/.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Protecting Florida's Springs: Meeting the Requirements of the Springs and Aquifer Protection Act*, FLA. DEP'T ENV'T PROT. (May 21, 2021, 10:55 AM), https://floridadep.gov/springs/protect-restore/content/protecting-floridas-springs.

[181] *Id.*

[182] *Id.*

[183] *See Septic Upgrade Incentive Program*, FLA. DEP'T ENV'T PROT. (July 31, 2020), https://floridadep.gov/springs/restoration-funding/content/septic-upgrade-incentive-program; Katie Kustura, *Plans to Oust 2,300 Septic Tanks in Debary Include Vacuum Sewer System, No Water Lines*, THE DAYTONA BEACH NEWS-JOURNAL (Aug. 16, 2021, 11:04 AM), https://www.news-journalonline.com/story/news/local/volusia/2021/08/16/mandated-debary-looking-swap-septic-tanks-vacuum-sewer-system/8076854002/.

ida Keys convert all residential homes from septic to sewer systems.[184] The Legislature was motivated by the Keys' propensity for flooding and hurricane damage as well as the difficulty in getting clean water and supplies to the Keys during hurricanes.[185] It cost the Keys nearly one billion dollars to move all residents over, but by 2007 the Keys were converted to sewer.[186]

Many other municipalities, especially those in high risk flood zones, hope to follow this model as flooding only gets worse and the risk of septic overflow increases.[187] However, septic to sewer conversions require that the government dig up the septic tank on someone's property, lay sewer lines through the yard, and connect the household.[188] The process can be arduous and requires workers to be on the property for several days laying lines and digging up septic tanks.[189] As many municipalities look to mandate septic to sewer conversions, the workers' access would become part of the mandate.[190] Municipalities could mandate homeowners to move from septic to sewer using the homeowners' own resources, but the regulation itself creates a situation where workers would have to access the land, triggering a *Cedar Point Nursery* taking. As proven by *Cedar Point Nursery*, the people accessing land do not have to be government affiliated, but merely there with government permission.[191]

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[184] Kevin Wilson, *Wastewater*, MONROE CNTY. FLA., https://www.monroecounty-fl.gov/124/Wastewater (last visited Jan. 4, 2022).

[185] *See id.*

[186] *Id.*

[187] *See Septic Upgrade Incentive Program*, *supra* note 183.

[188] *Septic to Sewer Conversions*, CITY OF PORT ST. LUCIE FLA., https://www.cityofpsl.com/government/departments/utility-systems/septic-to-sewer-conversions (last visited Jan. 4, 2022). For non-mandated septic conversion instructions where the homeowner hires their own plumber to connect to sewer, see *Converting Your Septic System to County Wastewater for Residential Dwellings*, HILLSBOROUGH CNTY FLA., https://www.hillsboroughcounty.org/en/residents/property-owners-and-renters/water-and-sewer/converting-your-septic-system-to-county-wastewater (last visited Jan. 4, 2022).

[189] *See Septic to Sewer Conversions*, *supra* note 188; *Converting Your Septic System to County Wastewater for Residential Dwellings*, *supra* note 188.

[190] *See See Septic to Sewer Conversions*, *supra* note 188; *Converting Your Septic System to County Wastewater for Residential Dwellings*, *supra* note 188; Wilson, *supra* note 184.

[191] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021).

While moving from septic to sewer is extremely important for the future of Florida's public health, workers' lack of site access may prevent any implementation of the mandate.[192]

C. *The Growing Fear of Regulation After* Cedar Point Nursery

Cedar Point Nursery complicates potential environmental regulations that Florida and its municipalities may wish to enact in order to preserve the state's coastal future. *Cedar Point Nursery*'s confusing application is part of a libertarian goal—the per se rule adopted by the Roberts Court stands in the way of regulation for fear that any government granted access will be struck down as a taking through injunctive relief or, as Justice Barrett considered, prohibitive expense.[193]

The practical harm of *Cedar Point Nursery* is the fear of regulation the ruling creates. Over twenty-five years after *Lucas*, South Carolina's beachside development continues unabated.[194] State officials rarely deny building permits for fear that denial will amount to a takings suit.[195] J. Peter Byrne of Georgetown argues that regulators' fears of costly litigation, takings liability, and political discord prevent more regulation than the *Lucas* holding ever could.[196] *Cedar Point Nursery* could create the same trepidation, and rather than challenging the per se holding, regulators may hold off on needed policies for fear of the potential repercussions.

IV. EXCEPTIONS THAT SWALLOW THE WHOLE: THE POTENTIAL OF REDEFINING BACKGROUND NORMS TO FACILITATE FLORIDA ENVIRONMENTAL REGULATION

Cedar Point Nursery may allow an escape route. Citing to *Lucas* before it,[197] Chief Justice Roberts may have inadvertently opened

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192 *See id.*

193 *See id.*; Millhiser, *supra* note 119.

194 J. Peter Byrne, *A Fixed Rule for a Changing World: The Legacy of* Lucas v. South Carolina Coastal Council, 53 REAL PROP., TR. & EST. L. J. 1, 22.

195 *Id.*

196 *Id.*

197 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021).

the possibility of regulation and delivered an avenue for Florida environmentalists looking to push forward health and safety environmental regulations that require access to private spaces.[198] Roberts uses background "norms" as one of the exceptions to the per se rule.[199] He stated that "[m]any government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights."[200] These background norms, as discussed in Part I, have not always been so easy to define. To Justice Scalia, background norms were confined to common law doctrines, specifically common law public and private nuisance.[201] Yet, Justice Kennedy opened the door to expanding background norms to statutory as well as the common law ideas.[202] In Chief Justice Roberts's opinion he cites to the common law doctrine of necessity, which defines necessary terms as "entry to avert an imminent public disaster" or "to avert serious harm to a person, land, or chattels."[203] Savvy regulators willing to brave potential takings challenges can use these background principles to expand environmental regulation rather than curtail it. Recalling *Mugler*, environmental laws evoke the benefit/harm dichotomy as environmental regulation is both retrospective and prospective because it addresses past harms and plans to provide for the future.[204] While nuisance law and the nuisance exception is limited as they can only account for harm committed, scientific data on climate change provides concrete necessity for proactive regulation; preventing public harm from climate disaster becomes the necessity to which Roberts alluded.

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198 Dan Farber, *The Illusions of Takings Law*, LEGALPLANET (July 1, 2021), https://legal-planet.org/2021/07/01/the-illusions-of-takings-law/ [hereinafter Farber, *The Illusions of Takings Law*].

199 Cedar Point Nursery, 141 S. Ct. at 2079.

200 *Id.*

201 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

202 *Id.* at 1035 (Kennedy, J., concurring).

203 Farber, *The Illusions of Takings Law*, *supra* note 198; Cedar Point Nursery, 141 S. Ct. at 2079 (referencing Camara v. Mun. Ct. of City & Cnty. of San Francisco, 387 U.S. 523 (1967)).

204 Mugler v. Kansas, 123 U.S. 623, 623 (1887).

Background principles have the potential to swallow the *Cedar Point Nursery* rule entirely.[205] Professor Michael Blumm and Lucas Ritchie wrote in 2005 about the legacy of the *Lucas* case, calling it a lesson on "the law of unintended consequences."[206] While *Lucas* promised to deliver a victory for property owners everywhere, the complete economic loss value proved limited in scope, but the categorical defenses that arose from the ruling became rather expansive.[207] In essence, Blumm and Ritchie argue, *Lucas* created a new threshold issue for all takings cases (rather than a new per se category).[208] *Lucas* demands that courts consider the nature of the landowner's property rights to allow governments' categorical defenses to be heard.[209]

Lower courts in particular have adopted the background norms argument to compete against total economic loss.[210] Lower courts identified several background principles grounded in historic property rights.[211] Notably, they have expanded the public trust doctrine which ordinarily limits private rights on navigable waters and adjoining lands.[212] State courts have applied the public trust doctrine liberally as a background principle, expanded it application to tributaries of navigable waters and dry beach.[213] Lower courts have also invoked background norms to uphold beach access, protect instream water flows, ensure state ownership of wildlife under common law, and more all in the face of takings claims.[214] In short, as Blumm and Rachel Wolfard observed, background principles "[have] swallowed the categorical per se takings rule *Lucas* established, simply

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205 Farber, *The Illusions of Takings Law*, *supra* note 198.

206 Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV'T L. REV. 321, 323 (2005).

207 *Id.*

208 *Id.*

209 *See id.*

210 *Id.* at 322.

211 Farber, *Requiem for a Heavyweight*, *supra* note 80, at 214–15.

212 *Id.*

213 *Id.*

214 *Id.* at 215.

because there are many more background principles than economic wipeouts."[215]

Rather than curtailing *Lucas*'s legacy of background norms, Roberts may have expanded it in *Cedar Point Nursery*.[216] While Scalia explicitly recognized common law background norms, Roberts has added another broad category: preventing harm to the public, individuals, land, or property.[217] Applying *Lucas*'s lessons, Floridian regulators should create environmental policies based in background principles despite *Cedar Point Nursery*'s new per se test.[218] This means that, rather than shying away from regulation that would require entrance onto land, Floridian regulators should embrace it but justify the intrusion with well-established background principles. In building regulation, Floridian regulators should utilize public impetus to push stricter building inspection policies, leaning on the norms of public safety and well-being. Floridian municipalities can also look to their current building codes and call on statutorily entrenched principles in addition to health and safety norms.

Further, Florida's state and local governments can utilize Roberts's quid pro quo exception to install both septic to sewer conversions and promote building electrification. By latching onto the language the Supreme Court used, Florida policymakers can create a system that allows for green expansion within the legal framework laid out by the Court while still authorizing temporary physical invasions onto land.

Florida is uniquely positioned to test the waters of *Cedar Point Nursery*'s ruling. Florida lawmakers are often hesitant to use government regulation.[219] Yet, Florida's coastal location has positioned it in a fight for survival; Republican Governor Ron DeSantis has brought more Department of Environmental Protection enforcement actions under his term than his predecessor, former Governor Rick

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215 Blumm & Wolfard, *supra* note 81, at 1169.

216 Farber, *The Illusions of Takings Law*, *supra* note 198.

217 *Id.*; *see* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021).

218 *See* Farber, *The Illusions of Takings Law*, *supra* note 198.

219 *See, e.g.*, Gary Fineout, *Florida Legislators Ready DeSantis' Anti-mandate Law*, POLITICO (Nov. 17, 2021), https://www.politico.com/newsletters/florida-playbook/2021/11/17/florida-legislators-ready-desantis-anti-mandate-law-495128.

Scott.[220] Governor DeSantis has particularly shown favor for septic to sewer conversions, overseeing multimillion dollar state funds to overhaul efforts.[221]

Blumm and Wolfard in their retrospective on *Lucas* uncovered that many more statutory background principles than common law principles exist in lower court jurisprudence.[222] However, courts have been inconsistent with their recognition statutes or regulations as satisfying a background norm.[223] For example, New York state courts have turned out varying rulings on statutory backgrounds, finding that wetland regulation had no historic hook, while stating shoreline setback requirements were grounded in New York property backgrounds.[224] Statutory background arguments are made stronger when there is a common law doctrine accompanying it as the statute then serves to evidence the principle's existence.[225]

Florida can use both statutory and common law background principles to its advantage. For example, the 2016 Springs and Aquifer Protection Act provides justification for moving from septic to

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[220] Orlando Sentinel Editorial Board, Editorial, *Here's Why Rick Scott's Environmental Record as Governor Was a Disaster*, ORLANDO SENTINEL (Feb. 16, 2021), https://www.orlandosentinel.com/opinion/editorials/os-op-rick-scott-dismal-environment-record-20210216-cgvu5y4ojjg5hdgqtc5cr3rsge-story.html; Amy Green, *Environmental Oversight Improves Under DeSantis, But Enforcement Issues Remain*, NPR (Sept. 17, 2021), https://www.wmfe.org/in-florida-environmental-oversight-improves-under-desantis-but-enforcement-issues-remain/190520.

[221] Amy Green, *DeSantis Announces $394 Million Will Go Toward Wastewater*, WUSF PUB. MEDIA (Nov. 9, 2021, 4:06 PM), https://wusfnews.wusf.usf.edu/environment/2021-11-09/desantis-announces-394-million-will-go-toward-wastewater-improvements.

[222] Blumm & Wolfard, *supra* note 81, at 1193.

[223] *Id.* (citing Palazzolo v. Rhode Island, 533 U.S. 606, 606 (2001)). The Supreme Court rejected Rhode Island's statutory background reliance stating that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title." *Id.* at 1193, n.18. O'Connor in concurrence argued that the Palazzolo holding did not altogether eliminate the existence of statutory background norms, but rather it emphasized a fact-intensive analysis. *Id.*

[224] *Id.*

[225] *See id.* at 31. State courts have affirmed public ownership of wildlife within state borders through a combination of historic precedent and codified rules for hunting, fishing, and trapping.

sewer lines.[226] The background principle promoted in this act is the protection of Florida's precious water resources harmed by nitrogen pollutants through Florida's groundwater runoff.[227] While *Lucas* applies background principles to supersede total economic loss, the inquiry should be applied the same in a physical invasion case.[228] Physical invasions are a per se taking unless a background principle justifies the invasion; in this case, government mandates for sewer conversion workers should be permitted as the workers are facilitating cleaner water and removing nitrogen pollution from springs and drinking water as statutorily defined in Florida code.[229] Background principles thus are an antecedent inquiry before any per se test can be applied.[230] Government officials should raise background principles as an immediate defense to any takings claim thereby furthering the use of background norms in takings jurisprudence.[231]

Roberts's expansion of background norms into public health and safety is also important for justifying environmental regulation and inspections.[232] Under *Camara v. Municipal Court of City and County of San Francisco*, a 1967 Supreme Court case, public safety is a justifiable means of government entry.[233] While *Camara* was a Fourth Amendment proceeding, this concept can be expanded into comprehensive inspection regimes, especially regimes with the support of the public.[234] The grand jury report following the Surfside collapse provides clear expectations of how inspections should be

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[226] *See Protecting Florida's Springs: Meeting the Requirements of the Springs and Aquifer Protection Act*, *supra* note 180.

[227] *See id.*

[228] *See* Farber, *The Illusions of Takings Law*, *supra* note 198; Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021).

[229] *See Protecting Florida's Springs: Meeting the Requirements of the Springs and Aquifer Protection Act*, *supra* note 180; *Septic to Sewer Conversions*, *supra* note 188.

[230] Blumm & Wolfard, *supra* note 81, at 1194.

[231] *See id.*

[232] Cedar Point Nursery, 141 S. Ct. at 2079; Farber, *The Illusions of Takings Law*, *supra* note 198.

[233] Cedar Point Nursery, 141 S. Ct. at 2079 (citing Camara v. Mun. Ct. of City & Cnty. of S.F., 387 U.S. 523 (1967)).

[234] *Cf.* Farber, *The Illusions of Takings Law*, *supra* note 198 (arguing that *Cedar Point* may actually do more to restrict property rights than liberate them as environmentalists may be able to take advantage of Roberts's language).

conducted and how their frequency should be increased.[235] Further, Miami-Dade County already has a recertification process codified for buildings over three stories tall, which proved insufficient.[236] Re-codifying the recertification process and adding a more in depth inspection process that accounts for saltwater intrusion and other coastal building degradation in line with the grand jury report should fall under background norms as it is a statutory example of public health and safety.[237] This framework can be translated to Miami-Dade County's Climate Action Strategy as well, which hopes to mandate building retrofitting.[238] While the plan currently does not make clear how the mandate would be carried out, public-private partnership with government sponsored entry into buildings could be an option.[239] Building retrofitting falls under similar health and safety background norms as well as environmental protection and coastal appreciation.[240] The balance between "public benefit" and "private harm" dictate background principles, but especially where public benefit has been codified and put through rigorous debate,[241] it is easy to see where it might win out.

Florida should take these challenges to state courts, as state courts have pioneered the background norms principle to protect government regulation in the face of the takings project, although certain state courts have been friendlier than others to the idea of background norms.[242]

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[235] FINAL REPORT OF THE MIAMI-DADE COUNTY GRAND JURY, *supra* note 164.

[236] *Recertification of Real Estate Property*, *supra* note 171.

[237] *See* Farber, *The Illusions of Takings Law*, *supra* note 198.

[238] *Miami-Dade Climate Action Strategy*, *supra* note 157.

[239] *Id.*

[240] *See* Blumm & Wolfard, *supra* note 81, at 1183–91 (providing a list of lower court cases that have found background norms applicable or inapplicable. The list includes shoreline protection, beach access, wildlife preservation and more. It also acknowledges public necessity as a growing category).

[241] *See, e.g.*, *Climate Action Strategy*, *supra* note 157 (explaining how the CAS was developed over five categorical workshops with citizen input about what people wanted to see in the community and what was necessary for resilience measures moving forward).

[242] *See* Blumm & Wolfard, *supra* note 81, at 1189.

CONCLUSION

"Just how bad was the Supreme Court decision in *Cedar Point Nursery v. Hassid*? Bad, really bad," wrote Jonathan Miller a little over a month after the Roberts Court issued its decision.[243] Miller was not alone in this sentiment. Legal blogs, newspapers, podcasts, and more were quickly flooded with reactions to the *Cedar Point* case.[244] This case is an obvious facial victory for property rights proponents; a clear step towards deregulation.[245] As takings law becomes more perplexing and inundated with tests and categories, it becomes easier to say that "yes, this is a taking and compensation is due."[246] *Cedar Point* is also a clear attack on labor rights and unions, as the most apparent losers in all of this are the migrant farmworkers who no longer have clear access to worker support in their isolated work environments.[247]

Yet, *Cedar Point*, the ruling and the reactions, mirrors *Lucas*.[248] And just like with *Lucas*, *Cedar Point* has the potential to be overrun by the exceptions built into it. While the facial reading of the rule seems incredibly damaging for regulations and laws in Florida where the pressures of climate change continue to demand creative new laws and regulations, *Cedar Point*'s background principles may actually open the doors for categorical government defenses.[249] As Florida adapts to new climate challenges, the need for access regulation becomes clear.[250] The Miami-Dade Climate Action Strategy Plan's public-private partnerships for retrofitting existing buildings for green energy, increased condominium inspections and recertifications to prevent saltwater intrusion, and finally to septic to sewer

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[243] Jonathan Miller, *Supreme Court Cedar Point Decision Will Have Devastating Consequences for Ag Workers*, THE PUBLIC (Sept. 7, 2021) https://medium.com/the-public-magazine/supreme-court-cedar-point-decision-will-have-devastating-consequences-for-ag-workers-c68a607971ec.

[244] *E.g.*, *5-4*, *supra* note 6.

[245] Farber, *The Illusions of Takings Law*, *supra* note 198.

[246] Frank, *Supreme Court*, *supra* note 7.

[247] Miller, *supra* note 243; *5-4*, *supra* note 6.

[248] *See* Farber, *The Illusions of Takings Law*, *supra* note 198.

[249] *See* Blumm & Wolfard, *supra* note 81; Farber, *Requiem for a Heavyweight*, *supra* note 80.

[250] *See* Somvichian-Clausen, *supra* note 152.

conversion mandates, all require the government to access private property in some form.[251]

Florida policymakers must lean into background norms and assert the state's and its municipalities' rights to protect their citizens from climate change and disasters as an overarching background principle.[252] Florida must let the exceptions swallow the rule in order to effectively legislate for the future.

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[251] *See Miami-Dade Climate Action Strategy*, *supra* note 157; FINAL REPORT OF THE MIAMI-DADE COUNTY GRAND JURY, *supra* note 164; *Protecting Florida's Springs: Meeting the Requirements of the Springs and Aquifer Protection Act*, *supra* note 180; *Septic to Sewer Conversions*, *supra* note 188.

[252] *See* Blumm & Wolfard, *supra* note 81 (arguing that "necessity" has not yet become a popular defense but some lower courts have recognized it); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021); Farber, *The Illusions of Takings Law*, *supra* note 198 ("The number of landowners who lose out will very likely exceed the number who win from the ruling in the relatively few cases dealing with physical intrusions. Thus, from the point of view of most landowners, the Supreme Court's ruling may turn out to be a loss in practical terms.").