Texas A&M Law Review

Volume 10 | Issue 3

3-3-2023

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TOWARD PRINCIPLED BACKGROUND PRINCIPLES IN TAKINGS LAW

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Abstract

Oversights by lawyers, judges, and legal scholars have caused the Supreme Court's opinion in Cedar Point Nursery v. Hassid *to be deeply misunderstood. In* Cedar Point*, the Court rewrote much of takings law by treating temporary and part-time entries by the government or third parties onto private property as per se takings. Prior to* Cedar Point*, these sorts of government-authorized physical entries would have been evaluated under a balancing framework that almost invariably enabled the government to prevail. As it happens, there was a well-established rule of black letter law that California's lawyers and amici failed to invoke in defending the* Cedar Point *union organizer's access regulation: A physical takings claim accrues when a regulation authorizing third parties to enter private property is promulgated, not when the third party actually enters the land. A second timing rule was plausibly applicable too: Only the party that owned the land at the time the physical taking cause of action accrued can prevail, and Cedar Point Nursery acquired the land at issue decades later. As a result, Cedar Point Nursery's lawsuit was filed decades too late. Quite possibly by the wrong plaintiff. California's mistakes were probably outcome determinative.*

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

DOI: https://doi.org/10.37419/LR.V10.I3.3

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I. INTRODUCTION

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

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

2. *Id.* at 1027.

3. *Id.* at 1033–34 (Kennedy, J., concurring); *id.* at 1076 (Souter, J., statement supporting dismissal of writ of certiorari as improvidently granted). Bill Want, who was brought on to defend the State in *Lucas* and later became a law professor, explains his litigation strategy in Bill Want, *The* Lucas *Case: The Trial Court Strategy and the Case's Effect on the Property Rights Movement*, 27 STAN. ENV'T L.J. 271 (2008). The article makes it clear that Want thought Lucas's claim was a slam-dunk winner for the

fact, the land retained substantial residual value, and the new constitutional rule that *Lucas* announced was inapplicable to the actual facts of the case.[4]

Nearly three decades later, in *Cedar Point Nursery v. Hassid*,[5] attorneys for the State of California made a colossal strategic blunder, providing an even more conservative Supreme Court with a golden opportunity to rewrite Takings Clause jurisprudence. The result was a new per se rule that handed a major victory to property rights advocates and created immediate headaches for union organizers and their allies. After *Cedar Point*, the government owes compensation whenever it invades a landowner's property or authorizes third parties to do so with no end date, provided the invasion was not an isolated, one-time affair, the land at issue is not generally open to the public, and (echoing *Lucas*) the invasion is not authorized by background principles of state property law.[6]

Cedar Point is *The Force Awakens* of constitutional law. We saw basically the same film a generation ago,[7] so perhaps we should have anticipated the big explosion at the end. Nonetheless, early reviews of the most recent Takings Clause blockbuster tracked those of its predecessor.

Lucas, unquestionably the most significant Takings Clause case of the 1990s, prompted enormous alarm at the time it was handed down, with some scholars viewing it as a death knell for environmental regulation and a severe limitation on the government's ability to address collective action problems more generally.[8] Within a few years, a

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plaintiff, beginning in the trial court. It does not appear that he understood how favorable the then-applicable *Penn Central* framework was to governments, such that if he could just convince the trial court to apply existing law, he might well have won. *See generally* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 62–63 (2016) (showing that the government almost always wins under *Penn Central*, absent diminutions in value of 85–90% or greater). Even accounting for hindsight bias, it is difficult to avoid shaking one's head repeatedly as Want walks the reader through many of his fateful and questionable litigation strategy decisions. *See, e.g.*, Want, *supra*, at 291 (describing Want's response to a loss in the trial court as a feeling of overwhelming "helplessness" that prompted him to go "through the motions" on appeal).

4. *See* Jonathan S. Klavens, *At the Edge of Environmental Adjudication: An Administrative Takings Variance*, 18 HARV. ENV'T L. REV. 277, 280 n.11 (1994); Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411, 1412 (1993).

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

6. *Id.* at 2074, 2078–80.

7. *Compare* STAR WARS: EPISODE VI—A NEW HOPE (Lucasfilm Ltd. 1977), *with* STAR WARS: EPISODE VII—THE FORCE AWAKENS (Lucasfilm Ltd. 2015).

8. *See, e.g.*, J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOL. L.Q. 89, 117–20 (1995); William W. Fisher III, *The Trouble with* Lucas, 45 STAN. L. REV. 1393, 1403–05 (1993); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1455 (1993).

much more sanguine conventional wisdom emerged,[9] brought about by two complementary dynamics. *Lucas* turned out to be important, rather than revolutionary, because it created a rule that few governments were foolish enough to violate.[10] Governments learned from South Carolina's error, regulating in a way that prevented States from having to compensate landowners whose rights were curtailed. Moreover, the Supreme Court, in subsequent decisions, clarified that a maximalist reading of *Lucas* (which would have imperiled huge parts of the American regulatory state) was not in the cards.

Cedar Point, unquestionably the most significant Takings Clause case of the 2020s (so far), has likewise prompted grave alarm among many since the day it was handed down.[11] Deep distress over what the precedent portends is the consensus view in the academic literature, though a healthy variety of perspectives have emerged. In this Article, we bracket the question of whether *Cedar Point* was correctly decided in light of the arguments that were properly before the Supreme Court. It is sufficient to observe that a wide range of distinguished scholars expressed either concern or excitement (depending on their worldviews) that *Cedar Point* jeopardized various antidiscrimination laws, antiretaliation provisions, regimes governing union access to employer email systems, rent control ordinances, environmental protection laws, consumer protection laws, protections for disabled tenants, COVID eviction moratoria, and mandatory inspection regimes.[12] As

9. *See* JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 1108–09 (10th ed. 2022); Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1168–70 (2019).

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

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

12. *See, e.g.*, Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 196–200 (2021); Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 647 (2022); Cynthia Estlund, *Showdown at* Cedar Point*: "Sole and Despotic Dominion" Gains Ground*, 2021 SUP. CT. REV. 125, 144–47; Christina M. Rodriguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 124–25 (2021); Benjamin I. Sachs, *Safety, Health, and Union Access in* Cedar Point Nursery, 2021 SUP. CT. REV. 99, 102; Abigal K. Flanigan, Note, *Rent Regulations After* Cedar Point, 123 COLUM. L. REV. 475, 488 (2022); Amy Liang, Comment, *Property Versus Antidiscrimination: Examining the Impacts of* Cedar Point Nursery *on the Fair Housing Act*, 89 U. CHI. L. REV. 1793, 1810 (2022); Eduardo M. Peñalver, *The Obscure Case That Could Blow Up American Civil-Rights and Consumer-Protection Laws*, ATLANTIC (Mar. 25, 2021), https://www.theatlantic.com/ideas/archive/2021/03/cedar-point-scotus/618405/; Nikolas Bowie, *Do We Have to Pay Businesses to Obey the Law?*, N.Y. TIMES (Mar. 20, 2021), https://www.nytimes.com/2021/03/20/opinion/Supreme-Court-labor-property-rights.html; Richard A. Epstein, *A Bombshell Decision on Property Takings*, HOOVER INST.: DEFINING IDEAS (June 28, 2021), https://www.hoover.org/research/bombshell-decision-property-takings [https://perma.cc/X9J9-XRY5]; Ilya Somin, *Eighth Circuit Rules Eviction Moratoria Are Likely to Be Takings Requiring Just Compensation*

Niko Bowie put it, "anti-discrimination laws, anti-retaliation laws, fair housing laws, all of these are vulnerable."[13] Positivist arguments put forth to defend these mostly popular laws fail to persuade.[14] Some scholars' primary comfort was arguing that there weren't clearly enough votes to gut antidiscrimination protections for workers and tenants.[15] A conventional wisdom has yet to emerge regarding the nature of the threat *Cedar Point* poses to the regulatory state, and we do not know whether the Supreme Court will double down on *Cedar Point*'s per se rule after trimming *Lucas*'s sails a generation earlier.

But we do know one important thing. Government lawyers need not and should not repeat the mistake that California's lawyers made.[16] By correcting this mistake, governments may avoid having to compensate landlords who want to refuse to rent to members of a protected class, landlords whose ability to evict is constrained by rent control laws, employers who wish to fire workers involved in unionization efforts, and business owners who want to bill governments for the inconvenience of having to endure entry by health and safety inspectors. Most of these claims brought by property owners should fail if defended by government counsel who can learn from California's error.

Under the Fifth Amendment, REASON: VOLOKH CONSPIRACY (Apr. 9, 2022), https://reason.com/volokh/2022/04/09/eighth-circuit-rules-eviction-moratoria-are-likely-to-be-takings-requiring-compensation-under-the-fifth-amendment/ [https://perma.cc/YK65-6XSY]. *But cf.* Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1 (2022) (identifying several ways in which the apparently sweeping scope of *Cedar Point* could be curtailed); Julia D. Mahoney, Cedar Point Nursery *and the End of the New Deal Settlement*, 11 BRIGHAM-KANNER PROP. RTS. J. 43, 64 (2022) (arguing that "*Cedar Point* represents an evolution, not a revolution in the Court's property rights jurisprudence," while celebrating the Court's result and analysis).

13. Nikolas Bowie et al., *Implications of* Cedar Point Nursery, LPE PROJECT (Nov. 9, 2021), https://lpeproject.org/blog/excerpt-implications-of-cedar-point-nursery/ [https://perma.cc/HWG3-SLGL] (statement of Nikolas Bowie from transcribed excerpts of a panel hosted by the LPE Project and APPEAL on October 22, 2021).

14. For example, Steven Eagle correctly notes that at common law, innkeepers were required to accept all customers who behaved appropriately, and then argues that because of this background principle of common law, antidiscrimination protections are not vulnerable after *Cedar Point*. *See* STEVEN J. EAGLE, REGULATORY TAKINGS § 7-6(c)(2), at 7-88.2(1)–(2) (5th ed. 2012 & Supp. 2021). The problem is that these common carrier rules were circumscribed at common law. They did not apply to landlords or employers. Hence, the old English precedents would be easily distinguished by jurists who were motivated to turn antidiscrimination protections for tenants (as opposed to hotel guests) into takings, and the fact that inns—unlike apartments—are generally open to the general public provides a further basis for distinguishing them under *Cedar Point*.

15. *See, e.g.*, Bowie, *Antidemocracy*, *supra* note 12.

16. For another recent case in which a state government inexplicably failed to raise a statute of limitations defense against a takings claim based on state action that occurred in 1801(!), see *Schaghticoke Tribal Nation v. Stat*e, 283 A.3d 508 (Conn. App. Ct. 2022). The State won, nonetheless, on sovereign immunity grounds. *See id*. at 517.

So what error, akin to conceding that still-valuable land in *Lucas* had lost all its worth, could the Golden State's lawyers have made? The answer is straightforward: Cedar Point Nursery's claims were time-barred under well-established principles of black letter law. First, if the government authorizes a third party to enter private property, a Takings Clause cause of action arises when the statute or regulation that permits such entry is enacted, not at the (subsequent) date of the third party's entry onto the plaintiff's land. Second, and independently, under Supreme Court precedent, a cause of action for a physical taking is not transferrable to a new owner of land. It is not certain that this inalienability rule applies to *Cedar Point*-style physical takings, but there is a strong argument that it should. The regulation being challenged in *Cedar Point* was decades old, having been promulgated in 1975, long before Cedar Point Nursery's owners acquired the land.

So Cedar Point Nursery's lawsuit was filed decades too late. Probably by the wrong plaintiff. California objected to neither of these flaws in the plaintiff's case, thereby waiving both arguments on appeal and snatching defeat from the jaws of victory. To be clear, this was perhaps a more understandable mistake than the State's concession in *Lucas*. There, the Justices at least seemed aware of the government's egregious blunder. California's mistake evidently went unnoticed by all three dissenting Justices, all thirteen amici, and every scholar who has written about *Cedar Point* since. That makes the error all the more important to point out now.

Going forward, government lawyers can raise statute of limitations defenses, and barring a significant change in the black letter law, the government will win. Takings claims brought under *Cedar Point* to challenge parts of the Fair Housing Act or the National Labor Relations Act or local rent control ordinances or federal inspection regimes mostly should be rejected. Critics' darkest fears of *Cedar Point* probably will not materialize, at least for laws that are already on the books. Our analysis gives an easy, and probably welcome, escape hatch to Justices who would prefer to expand property rights without mandating the politically unpalatable result of forcing governments to compensate racist landlords for overriding their discriminatory preferences.[17]

17. *Cf.* Fennell, *supra* note 12, at 18 (noting that turning ADA reasonable accommodations requirements into per se takings is unimaginable and would erode the Supreme Court's legitimacy, while stating that it is challenging to explain why those provisions wouldn't be takings under *Cedar Point*). In our estimation, among the Justices in the *Cedar Point* majority, at least several seem unlikely to relish imposing an obligation on the government to compensate landowners when it enforces antidiscrimination law. The *Cedar Point* majority's favorable invocation of *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964), which held the Civil Rights Act of 1964 to be a non-taking, is a good clue in that regard. If that legal realist reading of

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

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

II. TAKINGS JURISPRUDENCE BEFORE AND AFTER *CEDAR POINT*

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

The Fifth Amendment's Takings Clause, made applicable to states and localities through the Fourteenth Amendment, states: "[N]or shall private property be taken for public use, without just compensation."[18] This clause prohibits the government from acquiring property through eminent domain without payment. In *Pennsylvania Coal Co. v. Mahon*,[19] the Court additionally held that it prohibits the government from burdening property in ways that are functionally equivalent to a classic eminent domain taking. The new theory of the

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the Justices is right, the question becomes whether *Cedar Point* and its progeny might doctrinally box them into imposing takings liability.

18. U.S. CONST. amend. V.

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

Takings Clause's applicability that emerged in *Mahon* is known as "implicit" or "regulatory takings."[20]

Prior to *Cedar Point*, there were three per se rules for regulatory takings, and the remainder of regulatory takings were subject to a deferential balancing framework. The first, and oldest, of the per se rules stems from a line of cases that begins with *Patterson v. Kentucky*,[21] then runs through *Fertilizing Co. v. Hyde Park*,[22] *Mugler v. Kansas*,[23] *Hadacheck v. Sebastian*,[24] and *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[25] to name the most relevant precedents. The rule that emerged from these cases is that when the government regulates in a way that substantially reduces a property's value it need not compensate the owner if the owner's use of their property was noxious.[26] Noxious uses are those that create substantial negative externalities for society.[27]

The second per se rule comes from *Loretto v. Teleprompter Manhattan CATV Corp.*,[28] in which a landlord challenged the placement of permanent cable wires and boxes on her property. The government did not think it needed to exercise eminent domain, and Loretto brought an inverse condemnation suit.[29] The Court held that where the government's action results in a "permanent physical occupation of property" there is a per se taking, regardless of the size of the invasion or the State's purpose.[30] The *Loretto* Court was careful to distinguish between "permanent physical occupations" and "temporary limitations on the right to exclude."[31] Such temporary limitations "do not absolutely dispossess the owner of his rights to use, and exclude others from his property," and they "are subject to a more complex balancing process to determine whether they are a taking."[32] Consistent with this principle, the Court distinguished the cable requirement from regulations requiring companies to permit access to union organizers under the National Labor Relations Act ("NLRA").[33] Under the NLRA, "access is limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration

20. Fennell, *supra* note 12, at 3, 5.
21. Patterson v. Kentucky, 97 U.S. 501 (1878).
22. Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878). For much more on *Fertilizing Co.*, see Lior Jacob Strahilevitz, Hyde Park*'s Two Turns in the Takings Clause Spotlight*, 50 J. LEGAL STUD. (SPECIAL ISSUE) S71 (2021).
23. Mugler v. Kansas, 123 U.S. 623 (1887).
24. Hadacheck v. Sebastian, 239 U.S. 394 (1915).
25. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).
26. *See, e.g.*, *Mugler*, 123 U.S. at 668–69.
27. *See, e.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 577–78 (1984).
28. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
29. *Id.* at 424.
30. *Id.* at 434–35.
31. *Id.* at 435 n.12.
32. *Id.*
33. *Id.* at 434 n.11.

of the organization activity."[34] Given these limits, "the 'yielding' of property rights [the NLRA] may require is both temporary and limited," and so it is distinguishable from a permanent physical occupation.[35] As recently as 2012, the Supreme Court reaffirmed the principle that temporary physical invasions did not fall under *Loretto*'s per se rule.[36]

The third per se rule comes from the case with which we began, *Lucas v. South Carolina Coastal Council*.[37] There, the Court held that when a regulation deprives an owner of "all economically beneficial or productive use of land," it is automatically a taking.[38] This per se rule "generated larger conceptual difficulties" than the rule in *Loretto*.[39] For one, "[i]t is impossible to say whether 'all' of something has been taken without defining the thing in question—all of what?"[40] The Court's subsequent precedents attempted to explain how to determine the denominator in these contexts.[41]

Harkening back to "noxious use" cases like *Mugler* and *Hadacheck*, *Lucas* also established that where a regulation merely codifies "background principles" that already limit a property owner's use of the property, there is no taking even if the owner suffers a total wipeout of property value.[42] To fall under this exception, the restriction must "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[43] Though this reading is not inevitable, *Lucas* arguably narrowed the scope of the *Mugler* line of cases by focusing on nuisances rather than "noxious uses."[44] (After all, not all noxious uses rise to the level of nuisances.) *Lucas* seems to refer to principles from common law:

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34. *Id.* (quoting Cent. Hardware Co. v. NLRB, 407 U.S. 539, 545 (1972)).
35. *Id.* (quoting *Cent. Hardware Co.*, 407 U.S. at 545).
36. *See* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 38–39 (2012).
37. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
38. *Id.* at 1015.
39. Fennell, *supra* note 12, at 6.
40. *Id.*
41. For more on the conceptual severance problem (also known as the "denominator problem") in takings, see Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents and the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988), and Laura S. Underkuffler, Tahoe*'s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727 (2004).
42. *Lucas*, 505 U.S. at 1029.
43. *Id.*
44. More precisely, it is unclear whether *Lucas*'s re-characterization of the *Mugler* line of cases applies only to the "background principles" exception to *Lucas*'s per se rule or reflected a change in the way the Court understood the *Mugler* cases more generally. One can read *Lucas* as saying that the State's obligation to pay compensation is only excused when the State is preventing land uses that would be nuisances. Alternatively, one can read *Lucas* more narrowly, so that the nuisance exception is only applicable to a government defense that arises in cases where the owner's property interest has been wiped out. Since *Lucas*, no Supreme Court case has examined the relationship between noxious uses and nuisances in any depth.

> [The] law or decree . . . must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[45]

It also refers to preexisting physical takings: The Court explained it would "assuredly . . . permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title."[46] Subsequent lower court opinions have held that statutes can also constitute such background principles.[47]

In *Palazzolo v. Rhode Island*,[48] the Court clarified that a law does not become a background principle merely because the property owner acquired the property after the law had taken effect.[49] As Justice Kennedy put it, a "law does not become a background principle for subsequent owners by enactment itself."[50] The Court did not elaborate on the circumstances under which a law might become a background principle, but "suffice[d] to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."[51] The Court went on to say, "A regulation or common-law rule cannot be a background principle for some owners but not for others."[52] In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[53] decided a year after *Palazzolo*, the Court indicated that background principles are not limited to common law rules, but also include administrative practices like zoning restrictions and ordinary delays in issuing building permits or variances. But since then, the Court has not explained under what circumstances an existing law could become a background principle. Enormous confusion about how to identify background principles has resulted.[54] Absent some rational nexus to a law's longevity, the notion of background principles becomes an empty vessel, a stand-in for judges' naked ideological preferences.

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45. *Lucas*, 505 U.S. at 1029.
46. *Id.* at 1028–29.
47. *See generally* Blumm & Wolfard, *supra* note 9, at 1193–1203.
48. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).
49. *Id.* at 629.
50. *Id.* at 630.
51. *Id.* at 629–30.
52. *Id.* at 630.
53. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 343 (2002); *id.* at 351–52 (Rehnquist, C.J., dissenting).
54. *See* Blumm & Wolfard, *supra* note 9, at 1169, 1182; Robert L. Glicksman, *Swallowing the Rule: The* Lucas *Background Principles Exception to Takings Liability*, 71 FLA. L. REV. F. 121, 126–40 (2020); Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 577 (2003).

If the government's action does not fall under any of these per se rules, it is analyzed under the fact-specific balancing framework developed in *Penn Central Transportation Co. v. City of New York*.[55] Under *Penn Central*, courts look to (1) the "economic impact of the regulation"; (2) "the extent to which it has interfered with distinct, investment-backed expectations"; and (3) the "character" of the government action.[56] As to the last factor, the Court explained, "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[57] Thus, "the physicality of a governmental burden remained potentially relevant under the 'character' prong of *Penn Central* whenever something short of a *permanent* occupation was involved."[58] Under *Penn Central*'s "pliable inquiry,"[59] the vast majority of takings challenges fail.[60] Because the *Penn Central* test is so favorable to the government, if none of the per se takings rules apply, a property owner is unlikely to prevail absent a near-total loss of value.[61]

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

The takings framework described in Part II.A held "relatively stable" until *Cedar Point*.[62] In *Cedar Point*, the Court considered a takings challenge to a California regulation allowing union organizers to access private property. The California Agricultural Labor Relations Act of 1975 makes it an unfair labor practice to interfere with agricultural employees' right to self-organization.[63] After the Act took effect, California's Agricultural Labor Relations Board promulgated a regulation granting a "right of access" to union organizers, with certain limitations.[64] The regulation was first promulgated in 1975, and while certain restrictions have been imposed in the years since, it has remained in its current form since 1985.[65] The current regulation permits labor organizers to "take access" to an agricultural employer's property for a maximum of three hours per day—one hour before

55. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
56. *Id.* at 124.
57. *Id.* (citation omitted).
58. Fennell, *supra* note 12, at 8.
59. *Id.* at 7.
60. *See* Krier & Sterk, *supra* note 3, at 88; Mahoney, *supra* note 12, at 50.
61. *See supra* note 3 and accompanying text.
62. Fennell, *supra* note 12, at 5–6.
63. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021) (citing CAL. LAB. CODE §§ 1152, 1153(a) (West, Westlaw through Ch. 1 of 2023–24 1st Exec. Sess., and urgency legis. through Ch. 2 of 2023 Reg. Sess.)).
64. *Id.*
65. *See* CAL. CODE. REG. tit. 8, § 20900 (Westlaw through 3/31/23 Reg. 2023, No. 13) (History).

work, one hour during employees' lunch break, and one hour after work—for up to four 30-day periods per year.[66] Access is limited to areas of the property where "employees congregate before and after working" or where "employees eat their lunch."[67] To "take access," the organizers must file written notice with the Board and serve a copy to the employer, but upon doing so the union has an immediate right to enter, and the regulation provides the government with no discretion to deny the union access.[68] Interference with the right of access may constitute an unfair labor practice, which can result in sanctions.[69]

Opponents of the 1975 law and associated regulations immediately challenged them in court, alleging that they were unconstitutional takings, due process violations, or in the alternative, unlawful trespasses. A trial court enjoined the regulation, but the California Supreme Court reversed in *Agricultural Labor Relations Board v. Superior Court*.[70] The court rejected the takings claim in 1976 on the basis of decades of Supreme Court and federal appellate court decisions that held that when there was a conflict between workers' rights to receive information about unionization and their employers' property rights to exclude, the former generally prevailed over the latter.[71] It rejected the due process claim after applying rational basis review,[72] and it held that any entries by union organizers were not trespasses under California law because the statute authorizing organizer access should be understood as a limited exception to the broadly applicable trespass statutes.[73] Thus, by 1976, California law was clear—a union organizer's entry onto private property for the purpose of speaking with workers considering unionization was neither a trespass nor a taking. California property owners had no right to exclude such entrants.

To be sure, the California Supreme Court thought that *Agricultural Labor Relations Board* presented a close case, with the court splintering four to three. But even the dissenters in that case took the position that many union organizer entries onto private property would be constitutionally permissible. In their view, though, the government had failed to show that the union organizers lacked reasonable alternative channels to communicate with the workers off the plaintiff's property.[74] As Justice Clark's dissent saw it, the *Agricultural Labor Relations Board* majority had embraced a per se rule in which union access to private property always trumped property owners' right to

66. *Id.* § 20900(e)(1)(A), (3)(A)–(B) (Westlaw).
67. *Id.* § 20900(e)(3)(A)–(B) (Westlaw).
68. *See id*. § 20900(e)(1)(B) (Westlaw).
69. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).
70. Agric. Lab. Rels. Bd. v. Superior Ct., 546 P.2d 687, 692, 699 (Cal. 1976).
71. *Id.* at 696.
72. *Id.* at 699.
73. *Id.* at 706.
74. *See id.* at 713 (Clark, J., dissenting).

exclude. A case-by-case balancing approach was more appropriate in the dissenters' view.[75] Concurring in *Cedar Point* decades later, Justice Kavanaugh explained that in his view "Justice Clark had it exactly right."[76] If workers both lived and labored on the owner's property, then denying union organizer access to the land deprived them of the "reasonable means of communicating with the employees," but because Cedar Point Nursery's workers were housed elsewhere, there was not a sufficiently powerful justification to overcome the owners' right to exclude.[77]

The twin disputes that arose in *Cedar Point* began 40 years after the union access regulation was promulgated and 39 years after *Agricultural Labor Relations Board* held that under state and federal law it was neither a taking nor a trespass. In July 2015, Fowler Packing, a California fruit grower, prevented United Farm Workers' organizers from accessing its property.[78] The union filed an unfair labor practice charge against Fowler, but the charge was subsequently withdrawn.[79] In October 2015, United Farm Workers' organizers entered Cedar Point Nursery's property without the required notice.[80] Cedar Point Nursery filed a charge against the union for failing to provide this notice, and the union, in turn, alleged that the nursery had engaged in an unfair labor practice.[81] According to the Complaint, this was the nursery's first interaction with United Farm Workers, but the record is silent as to Fowler Packing's history with the union.[82]

Concerned that the union organizers would seek to enter their property again, Cedar Point Nursery and Fowler Packing sought declaratory and injunctive relief prohibiting the Board from enforcing

75. *Id.*

76. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2081 (2021) (Kavanaugh, J., concurring).

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

78. *Cedar Point*, 141 S. Ct. at 2070 (majority opinion).

79. *Id.*

80. *Id.* at 2069–70.

81. *Id.* at 2070.

82. Complaint for Declaratory and Injunctive Relief at 5, *Cedar Point*, 141 S. Ct. 2063 (No. 1:16-CV-00185).

the regulation against them. They argued that the access regulation constituted a per se taking in violation of the Fifth Amendment because it granted union organizers an "easement . . . to enter [their] private property without consent or compensation . . . ."[83]

By the time the case reached the Ninth Circuit, the plaintiffs shifted emphasis from arguing that the government had seized an easement and that this amounted to a per se taking, instead emphasizing both that the government had authorized the unions to enter their land and that the resulting physical invasion was a per se taking because it had no end date.[84] The Ninth Circuit held that the access regulation was not a per se taking because it did not authorize a permanent physical occupation.[85] The court explained that unlike a traditional easement, it did "not grant union organizers a 'permanent and continuous right to pass to and fro' . . . ."[86] Rather, "[t]he regulation significantly limit[ed] organizers' access to the Growers' property."[87] Moreover, whereas a permanent physical occupation "chops through the bundle [of property rights], taking a slice of every strand," the access regulation only affected the right to exclude.[88]

Ultimately, the plaintiffs and the circuit court seemed to disagree over what counted as a *Loretto* permanent occupation. As the plaintiffs saw it, the absence of an end date made the California regulation a per se taking.[89] As the defendant and court saw it, the fact that the invasion did not persist for 24 hours a day, seven days a week rendered *Loretto* inapplicable.[90] The court missed an opportunity to differentiate between permanent and temporary invasions (which turn on the presence or absence of an end date), and full-time and part-time invasions (which turn on whether the government's entry is continuous or sporadic). A physical invasion could be permanent and

83. *Id.* at 9.

84. Cedar Point Nursery v. Shiroma (*Shiroma II*), 956 F.3d 1162 (9th Cir. 2020) (Paez, J., concurring in the denial of rehearing en banc); Appellants' Opening Brief at 18–19, Cedar Point Nursery v. Gould (*Gould II*), No. 1:16-cv-00185-LJO-BAM, 2016 WL 3549408 (E.D. Cal. June 29, 2016) (No. 16-16321). Judge Ikuta would have found a per se taking because in her view, the State appropriated an easement in gross. *See Shiroma II*, 956 F.3d at 1168–75 (Ikuta, J., dissenting from denial of rehearing en banc).

85. *Shiroma I*, 923 F.3d 524, 530 (9th Cir. 2019).

86. *Id.* at 532 (quoting Nollan v. Cal. Coastal Comm'n, 438 U.S. 825, 832 (1987)).

87. *Id.*

88. *Id.* (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).

89. *Id*. at 526–27.

90. *See, e.g.*, Answering Brief of Appellees William B. Gould et al. at 16, 19, *Gould II*, No. 1:16-cv-00185-LJO-BAM, 2016 WL 3549408 (E.D. Cal. June 29, 2016) (No. 16-16321) ("Unlike the taking in *Loretto*, the access regulation here does not sanction the permanent physical occupation of property. Instead, it authorizes temporary admission to the employer's property bound by strict time, place, and manner limitations. . . . The Growers mistakenly focus on how long the access regulation will be in operation rather than on how long, and under what limits, union organizers may access the Growers' worksites.").

part-time (as in *Cedar Point*); temporary and full-time (as in a case involving seasonal flooding from a government dam); temporary and part-time (as in a case where a police officer chases a fleeing suspect through a homeowner's backyard); or permanent and full-time (as in *Loretto*). Neither the judges nor the litigants provided a clear-headed analysis of how these two variables relate to each other, and which combinations (beyond *Loretto*) should be governed by per se tests.[91]

The Supreme Court granted *certiorari* and then reversed, holding that the access regulation constituted a per se physical taking, not a regulatory taking subject to *Penn Central*.[92] The Court explained, "Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude."[93] Notwithstanding the name "regulatory takings," the Court emphasized, "Government action that physically appropriates property is no less a physical taking because it arises from a regulation."[94] The access regulation fell into this category.

The Court insisted that its conclusion was consistent with previous precedents in which "intermittent," as opposed to "continuous," invasions were still categorized as takings.[95] For instance, the Court cited *Nollan v. California Coastal Commission*,[96] which involved a requirement that private property owners permit the public to pass through their beachfront property. The *Cedar Point* Court explained:

> What matters is not that the easement notionally ran round the clock, but that the government had taken a right to physically invade the [*Nollan* property owners'] land. And when the government physically takes an interest in property, it must pay for the right to do so. The fact that a right to take access is exercised only from time to time does not make it any less a physical taking.[97]

Consistent with its characterization of the access regulation in *Cedar Point* as a physical taking, the Court described it as granting a kind of quasi-easement.[98] The Court acknowledged that the regulation did not appropriate a "true easement in gross under California law because the access right may not be transferred, does not burden

91. After *Cedar Point*, it seems clear that permanent physical invasions are per se takings unless a recognized exception applies, regardless of whether the invasions are part-time or full-time. Temporary and part-time invasions are not per se takings and are better analyzed under trespass law. *See infra* text accompanying note 105. Temporary and full-time invasions presently do not constitute per se takings but are instead subject to a balancing test. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 38–39 (2012).

92. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).

93. *Id.*

94. *Id.*

95. *Id.* at 2075.

96. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

97. *Cedar Point*, 141 S. Ct. at 2075 (citations omitted).

98. *Id*. at 2073.

any particular parcel of property, and may not be recorded."[99] The Court, however, dismissed the notion that the access regulation was not a per se taking just because it "appropriate[ed] the growers' right to exclude in a form that [was] a slight mismatch from state easement law."[100] The Court further explained:

> For much the same reason, in *Portsmouth*, *Causby*, and *Loretto* we never paused to consider whether the physical invasions at issue vested the intruders with formal easements according to the nuances of state property law . . . . Instead, we followed our traditional rule: Because the government appropriated a right to invade, compensation was due.[101]

Under this "intuitive approach,"[102] when the government appropriates the right to exclude, a taking occurs, even if the intrusion does not infringe an interest recognized by state law. By extending *Loretto*'s per se rule to cover situations that were previously governed under *Penn Central*'s balancing test, the majority moved the law incrementally towards Richard Epstein's expansive vision of the Takings Clause's reach.[103]

Conscious of the potential for the per se rule to threaten existing regulations allowing entry onto private land, the Court offered three explicit exceptions and one implicit exception to the rule.[104] First, the Court distinguished between trespass and physical takings: "Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right."[105] Here the Court is deeming temporary, part-time invasions to be non-takings.

Second, the Court reaffirmed its holding in *Lucas* that physical invasions consistent with "longstanding background restrictions on property rights" do not qualify as takings.[106] The Court explained, "These background limitations also encompass traditional common law privileges to access private property."[107] These include entering

99. *Id.* at 2075.

100. *Id.* at 2076.

101. *Id.* (first referencing Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922); then United States v. Causby, 328 U.S. 256 (1946); and then Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)). Scholars on both the right and left have noted that *Cedar Point*'s characterizations of the Court's previous decisions are very difficult to reconcile with the precedents themselves. *See, e.g.*, Epstein, *supra* note 12; Estlund, *supra* note 12, at 138–40; Aziz Z. Huq, *Property Against Legality: Takings After* Cedar Point, 109 VA. L. REV. 233 (2023).

102. *Cedar Point*, 141 S. Ct. at 2076.

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

104. *Cedar Point*, 141 S. Ct. at 2078–80.

105. *Id.* at 2078.

106. *Id.* at 2079.

107. *Id.*

property to enforce criminal law, to execute an arrest warrant, to engage in a reasonable search, or because of public or private necessity.[108]

Third, "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking" so long as the "condition bears an 'essential nexus' and 'rough proportionality' to the impact of the proposed use of property."[109] Applying this framework from a trio of earlier cases involving unconstitutional exactions, the Court suggested most government health and safety inspections would not qualify as takings.[110]

Fourth, the Court emphasized that the government was on stronger footing when it mandated third-party access to private property that was already open to the public.[111] This part of *Cedar Point* allowed the Court to distinguish its earlier precedent in *PruneYard Shopping Center v. Robins*.[112] In *PruneYard*, the Court applied *Penn Central* to a requirement that a privately owned shopping center allow third parties to distribute leaflets on its property.[113] (The Court then held there was no taking under *Penn Central*.[114]) The *Cedar Point* Court explained, such "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."[115] The Court's explanation suggests that when the government grants a right of access to property already open to the public, *Cedar Point*'s per se rule does not apply. The Court suggested that civil rights laws prohibiting discrimination in places of public accommodation would fall into this category.[116]

The Court then found that none of these exceptions applied to the union access regulation at issue. First, the regulation granted a formal and recurring right of access, and so it was not a trespass.[117] Second, even though the regulation had been in effect since 1975, it did not qualify as a background principle of law: "Unlike a law enforcement

108. *Id.*

109. *Id.* (quoting Dolan v. City of Tigard, 512 U.S. 374, 386, 391 (1994)).

110. *Id.* A more elegant defense of many government inspection regimes is the idea that while mandated entries by government inspectors are physical takings, the inspection regimes enhance the value of the owner's property, for example, by promoting public confidence in the safety of any goods produced, or by spotting dangerous situations that may prompt injuries to workers and resulting liability. These benefits may function as implicit in-kind compensation. *Cf.* EPSTEIN, *supra* note 103, at 195–99. If a government inspection is less effective or less efficient than a private inspection regime serving the same interests would be, then the government might still owe compensation.

111. *Cedar Point*, 141 S. Ct. at 2076–77.

112. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

113. *Id.* at 82–83, 82 n.7.

114. *Id.* at 84.

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

116. *See id.* at 2076.

117. *Id.* at 2080.

search, no traditional background principle of property law requires the growers to admit union organizers onto their premises."[118] Third, "the access regulation [was] not germane to any benefit provided to agricultural employers or any risk posed to the public," so California could not require the access right as a condition of receiving some benefit.[119] Finally, the fruit growers' property was not open to the general public, and so it did not fall under the *PruneYard* exception.[120]

The Court's determination that the California union access rule was not a background principle of state property law is puzzling given that the statute and regulation were nearly 50 years old by the time the Court decided *Cedar Point*. If that pedigree isn't enough, it's unclear how old a law has to be before it becomes a background principle.[121] The Court never explained this aspect of its ruling. All it did was contrast the access regulation with other kinds of "traditional" restrictions that it did regard as inhering in title, such as those resulting from nuisance law, the common law of necessity, and the rights of law enforcement to arrest someone, enforce the criminal law, or conduct a lawful and reasonable search of the premises.[122]

Understandably, many observers were unnerved by Chief Justice Roberts's decision to brush aside the notion that the California regulation—just seven years younger than the Fair Housing Act—was a background principle of state property law. If the 1975 California statute and regulations did not count by 2021 as background principles that inhere in title, why shouldn't the 1968 Fair Housing Act suffer the same fate? The response to *Cedar Point* from the least alarmed property scholars fell back on the idea that the Court would nonetheless

118. *Id.* at 2080.

119. *Id.* Ben Sachs is sharply critical of this aspect of the Court's ruling because he believes that the union access restriction passes muster under the law governing exactions. *See generally* Sachs, *supra* note 12, at 104–23 (arguing that the California union access regulation protects workers against employer violence, which has been common during unionization campaigns, and helps ensure that legal protections against pesticide exposure are followed, serving a role that complements government health and safety inspections).

120. *Cedar Point*, 141 S. Ct. at 2076.

121. *See generally* Blumm & Wolfard, *supra* note 9, at 1207 (concluding, after reviewing many cases involving the "background principles" exception to liability under *Lucas*, that the "cases do not reveal how old a statutory provision must be to qualify as a background principle, but there is evidence to suggest that forty years is sufficient").

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

treat the Fair Housing Act as a background principle.[123] But no one has a good theory—other than a realist reading of the Justices' relative hostility to the goals of labor law—for why something magical happened between 1968 and 1975.[124] After *Cedar Point*, it is quite challenging to conclude that there are *any principles at all* underlying the Supreme Court's conception of background principles. Our goals in this Article include articulating coherent principles that are grounded in existing law and consistent with what the Court decided in *Cedar Point*. We argue that traditional cause-of-action-accrual rules supply such a principle.

Cedar Point is the most consequential Takings Clause decision since *Tahoe-Sierra* in 2002.[125] For many students in Property Law, *Cedar Point* will be the last case they read on the syllabus.[126] Our argument here is that the mistakes lawyers make affect what cases go to the Supreme Court, how the Justices understand them, and how far-reaching their implications will be. But our argument also should give first-year law students room for hope. It shows that creative lawyering and familiarity with technical doctrine can be outcome-determinative. That is a fitting place to end a course that tens-of-thousands of first-year law students take each year.

C. *The Substantive Implications of* Cedar Point

While the Court tried to cabin its holding in *Cedar Point*, its critics warned that it would disturb decades of laws. Justice Breyer, in dissent, expressed concern that the majority would threaten health and safety regulations allowing state access for everything "from examination of food products to inspections for compliance with preschool li-

123. *See, e.g.*, Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J. FORUM 1010, 1047 (Feb. 28, 2023).

124. *See id*. at 1047–50 (suggesting that, especially after *Cedar Point*, the Supreme Court's definition of "background principles" is unpredictable and not fully coherent).

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

126. The best-selling property casebook, Dukeminier and Krier's book, ends with *Cedar Point*. DUKEMINIER ET AL., *supra* note 9, at 1154. *Cedar Point* is the penultimate case in the second best-selling casebook, JOSEPH WILLIAM SINGER, BETHANY R. BURGER, NESTOR M. DAVIDSON & EDUARDO PEÑALVER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1202 (8th ed. 2021), which concludes with the topic of exactions.

censing requirements."[127] Critics charged that *Cedar Point* could also upend antidiscrimination, antiretaliation, and environmental laws.[128]

Take antidiscrimination law. Many civil rights laws that prohibit discrimination in places of public accommodation might fall within the *PruneYard* exception, but "much of antidiscrimination law regulates exclusion decisions on private property that is *not* open to the general public."[129] As Lee Anne Fennell has explained, "Title VII and the Fair Housing Act forbid discrimination (with narrow exceptions) in employment and housing, respectively, reaching even the most access-restricted residential, commercial, and industrial land."[130] Additionally, some civil rights laws require landowners to allow those with disabilities to bring assistive devices, service animals, and personal assistants onto private property.[131] Various prominent scholars posit that these foundational antidiscrimination laws are now suspect under *Cedar Point*.[132]

Cedar Point skeptics announced that antiretaliation laws, too, could be in jeopardy. Such laws prevent employers from firing employees who engage in union activity.[133] Because most workplaces are closed to the public, the *PruneYard* exception would not apply.[134] To Niko Bowie, *Cedar Point*'s "holding could [thus] make it financially impossible for governments to protect people who want to democratize their workplaces by organizing workers who are vulnerable to being fired."[135] The force of this argument, of course, depends on the amount of compensation owed.[136]

The existing scholarship even may have missed some potential implications of *Cedar Point*. Federal environmental laws often prevent landowners from removing animals, plants, or even pollutants from

127. *Cedar Point*, 141 S. Ct. at 2087 (Breyer, J., dissenting). For a discussion of environmental inspection laws jeopardized by *Cedar Point*, see Adam Smith, *Inspections, Exceptions, and Expectations:* Cedar Point *and Its Expansion of Regulatory Takings*, ENV'T NAT. RES. & ENERGY L. BLOG (Jan. 24, 2022), https://law.lclark.edu/live/blogs/180-inspections-exceptions-and-expectations-cedar [https://perma.cc/ZJ2B-9H78].

128. *See supra* note 12 and accompanying text.

129. Fennell, *supra* note 12, at 17.

130. *Id.*

131. *Id.*

132. *See supra* note 12 and accompanying text.

133. *See* Bowie, *Antidemocracy*, *supra* note 12, at 162.

134. *Id.*

135. *Id.*

136. Fennell concludes that the compensation due to Cedar Point Nursery, based on the rental value of a fraction of the land large enough to fit one standing organizer would be quite low. She pegs the average compensation due for each farm worker union organizer at just $4.51 per year. *See* Fennell, *supra* note 12, at 56. Surely that is a price that many legislatures would be willing to pay, though if enough owners demand hearings to determine compensation, the administrative costs for the State could be significant, perhaps prohibitively so. For further discussion of the just compensation issues, see Mark Kelman, *Staying in the Takings Lane: The Compensation Issue in* Cedar Point Nursery, 2022 CARDOZO L. REV. DE-NOVO 129, 142–149.

their land. For instance, the Comprehensive Environmental Response, Compensation, and Liability Act, better known as CERCLA, prohibits certain parties from taking remedial action to remove pollutants from their land without approval from the Environmental Protection Agency.[137] Justice Gorsuch, joined by Justice Thomas, has already indicated that "allow[ing] the federal government to order innocent landowners to house another party's pollutants involuntarily . . . invite[s] weighty takings arguments under the Fifth Amendment."[138] Under *Cedar Point*, requiring a landowner to house pollutants under CERCLA could be a per se taking.[139]

Cedar Point's fans have similarly argued that the decision could sweep away high-profile government actions like the COVID eviction moratorium.[140] The Eighth Circuit has held that this argument is a plausible interpretation of *Cedar Point*, reversing a lower court's dismissal of those claims as a matter of law.[141] Federal district courts in Washington, D.C., and Washington State reached the opposite conclusion, viewing the eviction moratorium as a regulation of an existing landlord-tenant relationship, more analogous to rent control laws than to the facts of *Cedar Point*.[142] And a roughly contemporaneous Eighth Circuit decision held *Cedar Point* inapplicable to a Minneapolis ordinance that prohibited landlords from rejecting prospective tenants purely on the basis of their criminal records, credit, or rental history.[143] Critically, the CDC eviction moratorium and the Minneapolis ordinance are new laws, not longstanding ones. So while we argue that challenges to longstanding antidiscrimination provisions and antiretaliation provisions are time-barred, that argument is not obviously available to governments defending these newly implemented moratoria and antidiscrimination measures.[144]

137. *See generally* 42 U.S.C. §§ 9601–9675.

138. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1364 (2020) (Gorsuch, J., concurring in part and dissenting in part).

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

140. *See, e.g.*, Somin, *supra* note 12.

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

142. Gallo v. District of Columbia, 610 F. Supp. 3d 73, 86–90 (D.D.C. 2022); Jevons v. Inslee, 561 F. Supp. 3d 1082, 1106–07 (E.D. Wash. 2021).

143. 301, 712, 2103 & 3151 LLC v. City of Minneapolis, 27 F.4th 1377, 1383 (8th Cir. 2022).

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

Setting aside recent legal developments like the eviction moratoria, there is an existing tool that prevents parties from bringing stale claims: the statute of limitations. At no point was a statute of limitations defense mentioned by any of the parties in *Cedar Point*. California made a ripeness argument in the trial court,[145] but it abandoned that argument on appeal.[146] When the Agricultural Labor Relations Board moved to dismiss at the district court level, it emphasized the Court's then-existing takings jurisprudence: The regulation did not allow for a permanent occupation, and so it should be analyzed under *Penn Central*'s government-friendly balancing test.[147] The District Court and the Ninth Circuit likewise focused only on the divide between temporary and permanent physical invasions.[148] Neither party suggested there was any issue with the statute of limitations or the timing of the case. When the case reached the Supreme Court, no amici made this argument either. If the Board had invoked the statute of limitations or another timing argument, would the regulation have survived?

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

Though several scholars have considered *Cedar Point*'s substantive implications, its per se rule will also shape the timing of takings claims. A takings claim accrues—meaning the statute of limitations begins to run—when the property is taken.[149] (So far so good.) Prior to *Cedar Point*, however, this could be a complicated inquiry for takings challenges based on access regulations. Courts had to apply *Penn Central*'s fact-specific balancing test to determine at what point the regulation rose to the level of a taking, if at all. After *Cedar Point*, there is no fact-specific balancing required. Part III.A explains that consistent with *Cedar Point*'s per se rule, a property owner's physical takings claim accrues the moment the statute at issue is enacted or the regulation at issue is promulgated. Cedar Point Nursery's claim first accrued in 1975, and their land was already zoned for agricultural uses and thus subject to the regulation at that point.[150] Part III.B explains under what circumstances courts will still be required to engage in fact-specific balancing. Part III.C explains the effects of this early accrual on takings challenges to existing laws. Finally, Part III.D ex-

145. *See Gould II*, No. 1:16-cv-00185-LJO-BAM, 2016 WL 3549408, at *3 (E.D. Cal. June 29, 2016).

146. *Shiroma I*, 923 F.3d 524, 530 n.5 (9th Cir. 2019).

147. *See Gould II*, 2016 WL 3549408, at *3–4.

148. *See id.*; *Shiroma I*, 923 F.3d at 530–34.

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

150. E-mail from Rachel Jereb, Senior Planner, County of Siskiyou, to Adrian Ivashkiv (June 28, 2022, 11:38 AM) (on file with authors) (noting that the land owned by Cedar Point Nursery is zoned for Prime Agricultural (AG-1) uses and that the county has no records of it being zoned for any other use previously).

plains what might happen if property is newly subjected to a longstanding restriction because of changes in the use of the land.

A. *Accrual Timing*

Let's start with an easy case of accrual inspired by the facts in *Nollan*.[151] California enacts a law requiring a property owner to "make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach."[152] This is a per se physical taking, even before *Cedar Point*, because it authorizes a permanent physical occupation: "[I]ndividuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[153]

As Gregory Stein explains in an analogous context, this law works a taking "the moment [it] becomes effective, even if no one ever actually uses the strip of land, because the [State] has appropriated the owner's power to exclude."[154] The owner's claim would thus ripen immediately, and "the statute of limitations . . . would begin to run at the same time, which means that if the owner were to wait too long to commence proceedings, her claim would expire."[155] The Supreme Court implied as much in *Chippewa Indians v. United States*,[156] which involved a statute that simultaneously created a national forest on what had previously been government lands held in trust for a tribe and permitted the logging of timber on that land. The Court held that the date of the taking was the day the statute was enacted, not the (much later) date when the government sold the timber and it became apparent that a government appraisal of that timber used to compensate the tribe was too low.[157]

Now consider a slightly harder case, drawn from the Federal Circuit's decision in *Fallini v. United States*.[158] Regulations under the Wild Free-Roaming Horses and Burros Act prohibit ranchers from fencing their water sources in ways that prevent wild horses from accessing that water, and ranchers allege the cost of providing water to these horses totals $1 million.[159] The ranchers bring an as-applied inverse condemnation suit.

151. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).
152. *Id.* at 831.
153. *Id.* at 832.
154. Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89, 100–01 (2000); *see also* Suitum v. Tahoe Reg'l Plan. Agency, 520 U.S. 725, 736 n.10 (1997), *overruled on other grounds by* Knick v. Township of Scott, 139 S. Ct. 2162 (2019).
155. Stein, *supra* note 154, at 101–02.
156. Chippewa Indians v. United States, 305 U.S. 479 (1939).
157. *Id.* at 481–83.
158. Fallini v. United States, 56 F.3d 1378 (Fed. Cir. 1995).
159. *Id.* at 1380.

When does the claim accrue? Unlike *Nollan*, the government has not appropriated a formal easement. One might argue that "every drink by every wild horse [is] a new and independent federal taking," triggering a new statute of limitations.[160] Or taking a less ambitious approach, one might argue that the claim does not accrue until the first horse actually enters the land.[161]

The Federal Circuit has nonetheless analogized cases like this to *Nollan*: The takings claim accrues when the legislation is enacted, prior to the entry of any horse.[162] "What the [ranchers] may challenge under the Fifth Amendment is what the government has done, not what the horses have done."[163] The only governmental action involved was the enactment of the statute "forbidding the [ranchers] from shooing the horses away from the water," so that "action cannot be regarded as recurring with every new drink taken by every wild horse, even though the consumption of water by the wild horses imposes a continuing economic burden on the [ranchers]."[164] As the *Fallini* court put it, "it is the enactment of the statute, not the individual intrusions by the horses, to which a court must look to determine if there has been a taking."[165]

In subsequent cases, the Federal Circuit expanded on the *Fallini* principle, explaining its broad applicability: "What a plaintiff 'may challenge under the Fifth Amendment is what the government has done, not what [third parties] have done.'"[166] Or, as the Federal Circuit put it a few years ago, "it is the final decision of the government actor alleged to have caused the taking that triggers accrual of a takings claim, not the ultimate impact of that decision."[167] In an inverse condemnation suit, the takings claim arises when the government authorizes a third party to restrict a property owner's rights, not when the third party actually exercises that ability to restrict the owner's use.[168] Thus, when Congress gave the Hopi and Navajo Tribes the ability to veto development on land where both tribes had joint and undivided interests, the court held that the taking occurred on the

160. *Id.* at 1382.

161. The Federal Circuit did not discuss this argument in *Fallini*, but it rejected a similar argument in an analogous case. *See* Goodrich v. United States, 434 F.3d 1329, 1331–33 (Fed. Cir. 2006).

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

163. *Fallini*, 56 F.3d at 1383.

164. *Id.*

165. *Id.*

166. Navajo Nation v. United States, 631 F.3d 1268, 1274 (Fed. Cir. 2011) (alteration in original) (quoting *Fallini*, 56 F.3d at 1383).

167. Campbell v. United States, 932 F.3d 1331, 1338 (Fed. Cir. 2019).

168. *Navajo Nation*, 631 F.3d at 1275.

date Congress gave the Hopi and Navajo these mutual consent rights to block development—not on a subsequent date when the Hopi exercised those rights.[169] As a result, the Navajo's takings claim against the government was time-barred.[170] And when the Forest Service issued a record of decision authorizing a neighboring cattle rancher to use water rights that had been assigned to John Goodrich, the Federal Circuit held that the cause of action for a physical taking accrued on the date of that decision, not years later, when the neighbor began utilizing Goodrich's water.[171]

The Supreme Court has endorsed this view, albeit in the context of regulatory takings.[172] Other circuits have endorsed it in the context of facial challenges to statutes alleging they constitute physical takings.[173] And it appears that the same rule applies to as-applied challenges, too, at least under contemporary ripeness doctrine.[174] As soon as the law makes it clear to which properties an alleged taking applies, a cause of action accrues, even though no one has yet interfered with the owner's use and enjoyment of their property.[175]

Eminent domain actions are subjected to a different rule. When the government physically condemns property and initiates a lawsuit to take title, the taking does not occur until the government forks over just compensation and title transfers.[176] Yet the Supreme Court has clarified that this rule only applies to instances when the government concedes that a taking has occurred, as opposed to those instances like *Cedar Point* when the landowner initiates a suit following an inva-

169. *Id*. at 1273.

170. *Id*. at 1273–75.

171. Goodrich v. United States, 434 F.3d 1329, 1336 (Fed. Cir. 2006).

172. *See* Suitum v. Tahoe Reg'l Plan. Agency, 520 U.S. 725, 736 n.10 (1997), *overruled on other grounds by* Knick v. Township of Scott, 139 S. Ct. 2162 (2019).

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

174. Sometimes different accrual rules apply to facial and as-applied takings challenges. A facial takings suit necessarily argues that the enactment of a statute deprived all effected owners of property. But as-applied suits typically involve statutes that authorize the government to restrict property rights without forcing it to do so. The cause of action for those as-applied suits does not accrue until the government exercises its discretion and concludes that the law applies to the property at issue. *See* Petworth Holdings, LLC v. District of Columbia, 531 F. Supp. 3d 271, 278–79 (D.D.C. 2021). When the government writes a statute that permits third parties to act without giving government any discretion to control those parties' actions, the cause of action for a facial challenge and an as-applied challenge accrue simultaneously. The statute at issue in *Cedar Point* provides the government with no discretion. *See supra* text accompanying note 68. Under Judge Boasberg's approach to *Petworth Holdings*, an ordinance that plainly deprives a landowner of the right to exclude creates a physical taking immediately, meaning that the taking cause of action becomes ripe and the statute of limitations starts running. *Petworth Holdings*, 531 F. Supp. 3d. at 279–82.

175. Nat'l Advert. Co. v. City of Raleigh, 947 F.2d 1158, 1163–65 (4th Cir. 1991) (holding that takings claim accrued when ordinance was enacted, not when amortization period required by the ordinance ended).

176. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 11–15 (1984).

sion.[177] In inverse condemnation suits, the government's obligation to compensate the owner arises when the government deprives the owner of property, and if there is a delay between that moment and the time when compensation is paid, the government is liable for interim damages resulting from the temporary taking.[178]

There are other exceptions to the *Fallini* principle that arise when a physical taking occurs via a gradual process, as with flooding whose extent is not immediately apparent, but courts consider these exceptions inapplicable when the government action at issue is the enactment of a statute or the promulgation of a regulation.[179] Another important exception arises when it is the government itself, rather than a non-governmental actor, that physically invades the plaintiff's property interest. In those instances, there is sometimes obvious state action that may trigger a new cause of action under the Takings Clause, even if the government's physical invasion is authorized by a statute that has long been on the books. This principle explains why the plaintiff's claims in *Horne v. Department of Agriculture* were not time-barred, even though the statute authorizing the seizure of Horne's raisins was enacted in 1937.[180]

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

Consider avigation easements. In *United States v. Causby*,[181] the Supreme Court held that flights over private land work a taking where "they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[182] Unlike the cases

177. *Id.* at 14–15 ("[W]e do not find, prior to the payment of the condemnation award in this case, an interference with petitioner's property interests severe enough to give rise to a taking . . . . Until title passed to the United States, petitioner was free to make whatever use it pleased of its property.").

178. First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 319 (1987); see also KLK, Inc. v. U.S. Dep't of Interior, 35 F.3d 454, 457 (9th Cir. 1994) ("Although the concept of 'just compensation' is the same in traditional and inverse condemnation proceedings, the actions are sufficiently different so that procedures applicable to one type of action do not necessarily apply to the other. For example, in an inverse condemnation action, just compensation is based on the value of the land at the time it is seized, while in a traditional condemnation, the land is valued at the time the condemnation proceeding occurs.").

179. *See* Etchegoinberry v. United States, 114 Fed. Cl. 437, 475–76, 483–84 (2013).

180. Horne v. Dep't of Agric., 576 U.S. 350 (2015).

181. United States v. Causby, 328 U.S. 256 (1946).

182. *Id.* at 266.

above, then, a takings claim for an avigation easement did not accrue immediately, nor when the government first built the airport, nor even when the first plane flew over the property owner's land.[183] Rather, because a taking occurred only if the planes were "so low and so frequent" as to substantially interfere with enjoyment and use of the land, the property owner had to wait to bring the claim.

As the Court of Claims explained after *Causby*, there was "unfortunately, no simple litmus test for discovering" this moment of accrual.[184] Because, under *Causby*, "[s]ome annoyance [had to be] borne without compensation," the court had to weigh a host of factors to determine when (and whether) the taking occurred: "the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life."[185] For instance, the Federal Circuit once analyzed the change in decibel levels following the switch from the A-6 aircraft to the EA-6B aircraft to determine the moment of accrual.[186] Not all lower courts weighed the same factors.[187] Yet, the Court of Claims' statement reflects the difficulty in determining the moment an avigation easement had been taken—and thus the moment the clock began to run—when a taking is defined by a fact-specific balancing test.

As another example, take the regulation in *Cedar Point*. Prior to the Court's decision, to determine when—and whether—the access regulation took Cedar Point Nursery's land would require the court to assess at what point the economic impact of the regulation, its interference with distinct, investment-backed expectations, and its "character" rose to the level of a taking.[188] The court might look to how often union organizers actually enter the land and for how long, whether they interfered with the farm's operations enough to create an easement,[189] whether the property owners had made discrete investments, and so on. Given the need for this fact-specific balancing, a property owner could likely bring a claim long after the access regulation was first promulgated. A reasonably diligent owner who argued that the legal line was crossed at *this point* rather than *that point* would

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

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

185. *Id.*

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

187. For a discussion of the varying approaches to determining the moment of accrual for an avigation easement, see 6A NICHOLS ON EMINENT DOMAIN § 36.08, LEXIS (database updated 2023).

188. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

189. *See Shiroma II*, 956 F.3d 1162, 1165–66 (9th Cir. 2020) (Ikuta, J., dissenting from denial of rehearing en banc) ("The union organizers disrupted work by moving through the trim sheds with bullhorns, distracting and intimidating the workers.").

likely get the benefit of the doubt from a court, particularly in the absence of hard-and-fast evidence about the relevant timeline and intensity of uses.

Following *Cedar Point*, this analysis changes. As in *Nollan* and *Fallini*, the access regulation itself is a per se physical taking. As such, the claim accrues immediately, even before any union organizers actually enter the land. In the case of *Cedar Point*, this means the claim accrued as early as 1975 for property owners whose land was already subject to the regulation. Certainly by 1976, when the California Supreme Court decided that the regulation was neither a taking nor a trespass, the clock to sue in federal court started running. Note that the Ninth Circuit, where *Cedar Point* was litigated, has embraced a rule that mirrors *Fallini*'s.[190] One virtue of *Cedar Point* is replacing the indeterminate *Penn Central* accrual analysis with a bright line rule that is easy to administer much of the time.

Because of equitable tolling and disabilities that may excuse a particular landowner's failure to sue right away (such as being a minor or incarcerated),[191] there will be a temporal gap between the statute of limitations period and the date at which a government regulation is categorically "in the clear." The Supreme Court has held that a "regulation or common-law rule cannot be a background principle for some owners but not for others."[192] Thus, the fact that a particular landowner is time-barred from bringing a takings claim does not itself transform the regulation or statute they would have wanted to challenge as a background principle of state property law. As a rough approximation, a statute or regulation authorizing third-party entry may be definitively immune from takings suits roughly 20 years after the statute of limitations would ordinarily run because at that point even an infant owner would have reached the age of majority. This span of two decades plus the statute of limitations period provides a temporal limitation that isn't far off from many judges' intuitions about how old a restriction on the use of land must be to qualify as a background principle.[193]

B. *The Continued Relevance of Balancing*

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

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

191. *See* DUKEMINIER ET AL., *supra* note 9, at 106.

192. Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001).

193. *See* Blumm & Wolfard, *supra* note 9, at 1207.

need to engage in fact-specific balancing to determine when the taking occurred.

For instance, prior to *Cedar Point*, courts did sometimes treat intermittent government entry as a physical taking, rather than a regulatory taking, but only when the "physical intrusion . . . [rose] to the extreme level of a 'permanent' physical occupation."[194] In *Otay Mesa Property L.P. v. United States*, for instance, the plaintiff argued that the Border Patrol's activities on its land worked a per se physical taking.[195] To determine when the taking occurred—and thus when the claim accrued—the court had to conduct a "highly fact-specific" inquiry.[196]

For a period, the Border Patrol's presence on the land "was sporadic and transient at best, and neither party argue[d] that a physical taking occurred at that time."[197] By the mid-to-late 1990s, however, the Border Patrol's presence "grew from sporadic to pervasive."[198] To determine whether this intrusion rose to the level of a "permanent physical occupation," the court considered the increases in manpower, the size of the vehicle and helicopter fleets, the number of seismic sensors deployed, the amount of permanent and portable lighting, and the number of infrared night-vision goggles, as well as the physical alteration to the grading of the plaintiffs' roads.[199] In all, the court held, "If the Border Patrol's activity on Plaintiffs' property ever arose to a 'permanent and exclusive occupation,' it did so between 1996 and 1999."[200] Because plaintiffs brought their claims in 2006—more than six years after the taking occurred—the court concluded that most of the claims were barred by the statute of limitations.[201]

Under *Cedar Point*, this fact-specific analysis is still required, though under a different name. As the *Cedar Point* Court explained, "[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right."[202] In distinguishing between the two, courts can look to "the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue."[203] While a one-time and quick invasion would be a trespass, several enduring invasions presumably would trigger *Cedar Point*'s

194. Otay Mesa Prop. L.P. v. United States, 86 Fed. Cl. 774, 786 (2009) (citing Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982))), *aff'd*, 670 F.3d 1358 (Fed. Cir. 2012).
195. *Id.* at 775.
196. *Id.* at 786.
197. *Id.* at 787.
198. *Id.*
199. *Id.* at 787–88.
200. *Id.* at 788.
201. *Id.* at 776.
202. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2078 (2021).
203. *Id.*

per se rule. Before *Cedar Point*, the boundary between permanent occupations and temporary invasions demarcated the domain of per se takings that accrued immediately and potential takings that might accrue if they crossed an intensity threshold. Now the relevant boundary is between part-time invasions and trespasses. Developing rules of thumb to delineate this boundary may be straightforward. A rule specifying no more than *x* entries of *y* duration over *z* timeframe, perhaps with a sliding scale, would bring clarity and consistency to the doctrine.

C. *Effects of Early Accrual*

As explained in Part III.A, *Cedar Point* means that many takings claims related to access regulations should accrue immediately upon the enactment of the statute or regulation to be challenged. The effects of this early accrual are significant, especially at the federal level. Takings claims are brought through two vehicles: Federal government takings claims are brought under the Tucker Act, and state claims are often brought under 42 U.S.C. § 1983. The Tucker Act has a six-year statute of limitations.[204] This statute of limitations sets forth a strict jurisdictional bar to the consideration of cases after the period has ended, and as such, courts have an obligation to consider the statute of limitations sua sponte, even if the parties do not raise the issue.[205] For state claims, § 1983 itself does not specify a statute of limitations,[206] so courts apply the State's statute of limitations for general personal-injury torts.[207] This period is often short: In California, for instance, the statute of limitations is now two years,[208] though it was one year at the time that Cedar Point Nursery's cause of action arose in 1975.[209] This means that a property owner may only challenge an access regulation within a few years of its promulgation.

The Supreme Court's most recent Takings Clause opinion, its unanimous 2023 ruling in *Tyler v. Hennepin County*,[210] illustrates the contemporary Court's understanding that valid takings claims can still be time-barred if a landowner misses even a brief window to invoke their rights. In that case, Hennepin County tried to justify its seizure of a $40,000 condominium to satisfy a $15,000 tax delinquency by relying

204. 28 U.S.C. § 2501.

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

206. *See* 42 U.S.C. § 1983.

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

208. CAL. CIV. PRO. CODE. § 335.1 (West, Westlaw through Ch. 1 of 2023-24 1st Ex. Sess., and urgency legis. through Ch. 2 of 2023 Reg. Sess.); *see also* Maldonado v. Harris, 370 F.3d 945, 954–55 (9th Cir. 2004) (describing the change in 2002 to California's statute of limitations for personal injury claims from one year to two years). For state claims, the accrual date of a claim is still a question of federal law. *Wallace*, 549 U.S. at 388.

209. CAL. CIV. PROC. CODE § 340(3) (West 1982).

210. Tyler v. Hennepin County, 143 S. Ct. 1369 (2023).

on an earlier Supreme Court case, *Nelson v. City of New York*,[211] where the city had foreclosed on property because of an unpaid water bill. *Nelson* was distinguishable from *Tyler*, the Court said, because New York City had an ordinance giving property owners two months after the city filed for foreclosure to pay off their debts, and an additional 20 days after foreclosure to request that any surplus from the foreclosure sale be returned to the property owner.[212] The plaintiff had failed to file a timely request for the return of that surplus within 20 days, thereby forfeiting his Takings Clause argument.[213] As the Court put it, the "owners did not take advantage of this procedure, so they forfeited their right to the surplus."[214] The *Tyler* Court's decision to distinguish *Nelson* instead of overruling it shows that the Supreme Court remains comfortable strictly enforcing statutes of limitations that can produce harsh results for property owners asserting takings claims.

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

Property owners may try to argue they could not have brought their takings claims prior to *Cedar Point*'s modification of takings per se tests, and so the statute of limitations should be tolled or suspended. But courts are generally skeptical of the idea that statutes of limitations should be lengthened retroactively absent unusual circumstances.[215] For state claims, property owners may rely on equitable tolling, which "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action."[216] At the federal level, the Tucker Act's statute of limitations is jurisdictional, and thus not subject to equitable tolling.[217] The Federal Circuit has nonetheless turned to the "accrual suspension rule" to allow oth-

211. *Id*. at 1378 (citing Nelson v. City of New York, 352 U.S. 103 (1956)).

212. *Id*. (citing *Nelson*, 352 U.S. at 104–05, 104 n.1).

213. *Id*. (citing *Nelson*, 352 U.S. at 109).

214. *Id*. at 1379.

215. *See, e.g.*, Davis v. Valley Distrib. Co., 522 F.2d 827, 830 (9th Cir. 1975) ("It is the general rule that subsequent extensions of a statutory limitation period will not revive a claim previously barred.").

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

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

erwise untimely claims.[218] The rule suspends the accrual of a claim if "the plaintiff shows (1) that the government concealed its acts such that the plaintiff was unaware of their existence; or (2) that the injury was 'inherently unknowable.'"[219] Despite some differences between the two exceptions, Hadley Van Vactor argues the accrual suspension doctrine is "essentially an end run around the prohibition on the equitable tolling doctrine."[220]

In both contexts, courts have suggested that where a plaintiff did not bring their claim because they relied on "actually binding precedent that is subsequently reversed,"[221] the statute of limitations may be tolled or suspended. In particular, the Court of Federal Claims has allowed otherwise untimely takings claims to proceed based on intervening changes in Supreme Court precedent. In *Horne*,[222] the Supreme Court held that, when the Department of Agriculture requires raisin growers to physically transfer certain percentages of their raisin crop to the government, there is a "clear physical taking."[223] In *Ciapessoni v. United States*,[224] a raisin grower brought a putative class action based on the taking of reserve raisins from 2002 to 2009. The United States argued that a portion of the claims was barred by the statute of limitations, but the Court of Federal Claims applied the accrual suspension rule to allow the claims to proceed.[225]

The Court of Federal Claims noted that it had previously held the same reserve raisin requirement was not a taking.[226] The court accepted the plaintiffs' argument that "while they understood that a taking had occurred when the Committee designated a portion of their raisins as reserve raisins, [the court's precedent] barred their claims."[227] The court explained, "[T]he law barring their claim [then] changed on June 22, 2015, when the Supreme Court effectively overturned [the lower court's past precedent], in holding that the Marketing Order resulted in a physical taking."[228]

218. *See, e.g.*, Ladd v. United States, 713 F.3d 648, 652–53 (Fed. Cir. 2013).

219. *Id*. at 653 (quoting Ingrum v. United States, 560 F.3d 1311, 1314–15 (Fed. Cir. 2009)). Courts have asserted the doctrine is distinct from equitable tolling because it relies on the interpretation of the term "accrue" in the Tucker Act, rather than equitable principles. *See, e.g.*, Martinez v. United States, 333 F.3d 1295, 1319 (Fed. Cir. 2003).

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

221. Menominee Indian Tribe v. United States, 577 U.S. 250, 258 (2016) (emphasis removed).

222. Horne v. Dep't of Agric., 576 U.S. 350 (2015).

223. *Id.* at 361.

224. Ciapessoni v. United States, 129 Fed. Cl. 332 (2016).

225. *Id.* at 335–36.

226. *Id.* at 335.

227. *Id.*

228. *Id.*

It is unlikely that the courts will apply equitable tolling or accrual suspension to takings claims based on established access regulations, like Title VII and the Fair Housing Act. Notably, litigants may have difficulty arguing the existing legal landscape has changed because the Court explicitly framed *Cedar Point* as following from its existing precedents, rather than overruling them.[229] And unlike in *Ciapessoni*, where all takings claims were explicitly barred by past precedent,[230] litigants could always challenge access regulations as *Penn Central* takings prior to *Cedar Point*. It is probably dispositive, in our view, that the plaintiffs could have challenged the California regulation under *Penn Central* between 1975 and 2021. Even setting that *Penn Central* point aside, it is unlikely that the plaintiffs would have been able to prevail under the three factors that courts in California use to determine whether equitable tolling is appropriate: (1) timely notice of the claim to defendants, (2) lack of prejudice to defendants, and (3) good faith conduct on behalf of the plaintiff.[231] Decades passed after the California Supreme Court upheld the regulation and before anyone in state government got wind of a potential suit from Cedar Point Nursery and Fowler Packing, and the government is on the same footing with respect to equitable tolling as any private party.[232]

The continuing violations doctrine could provide a final basis for defeating statute of limitations defenses. Under this doctrine, a plaintiff might be able to bring an otherwise time-barred claim when the defendant's conduct is part of a continuing practice if the most recent act by the defendant falls within the statute of limitations period.[233] The continuing violations doctrine is only applicable when the defendant has engaged in continuing unlawful acts, not merely when there are persisting adverse effects that result from the defendant's original violation.[234] As a result of recent Supreme Court decisions, most nota-

229. *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021) ("The regulation appropriates a right to physically invade the growers' property—to literally 'take access,' as the regulation provides. It is therefore a *per se* physical taking under our precedents." (citation omitted) (quoting CAL. CODE REG. tit. 8, § 20900(e)(1)(C)). For the reasons identified by scholars such as Epstein, Estlund, and Huq, we find *Cedar Point*'s insistence that it was not fundamentally altering takings doctrine unconvincing. *See* sources cited *supra* note 101. Yet it is the Supreme Court's understanding of whether *Cedar Point* reflected a sea change in the law, not Epstein's, Estlund's, Huq's, nor ours, that is decisive with respect to whether bringing suit would have been futile under pre-*Cedar Point* takings law.

230. *Ciapessoni*, 129 Fed. Cl. at 335.

231. *See* McDonald v. Antelope Valley Cmty. Coll. Dist., 194 P.3d 1026, 1033 (Cal. 2008).

232. *See id.* at 1033 ("The defendants in [a prior California Supreme Court case] nevertheless argued equitable tolling should not apply to actions against public entities. We found no basis for any such global exception and rejected the assertion.").

233. *See* Bird v. Dep't of Hum. Servs., 935 F.3d 738, 746 (9th Cir. 2019); Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271 (2007/08).

234. Ocean Acres Ltd. P'ship v. Dare Cnty. Bd. of Health, 707 F.2d 103, 106 (4th Cir. 1983).

bly *National Railroad Passenger Corp. v. Morgan*,[235] "little remains of the continuing violations doctrine . . . [e]xcept for a limited exception for hostile work environment claims . . . ."[236] *Morgan* held the continuing violations doctrine inapplicable to "discrete acts" that are "easy to identify."[237] The enactment of a statute and passage of a regulation almost certainly would be characterized as easily identifiable discrete acts; hence the continuing violation doctrine should be inapplicable, and the baseline statute of limitations rules should apply. Recall the Federal Circuit's repeated insistence that "[w]hat a plaintiff 'may challenge under the Fifth Amendment is what the government has done, not what [third parties] have done.'"[238] When the government authorizes a third party to enter a property owner's land, the third party's actual entry is merely an "adverse effect" of that original taking.

For these reasons, the courts have generally been hostile to invocations of the continuing violations doctrine in the Takings Clause context. For example, the First Circuit in *Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jiménez* held the doctrine inapplicable to a takings claim brought by an insurer who challenged a Puerto Rico regulation requiring automobile insurers to pay a portion of their profits into a common premium-stabilization fund.[239] The plaintiff alleged that the regulation on its face violated the Takings Clause, but the plaintiff did not sue immediately. The court explained that the facial challenge was untimely: A takings claim brought under § 1983 accrues "when the purportedly unconstitutional statute or regulation is enacted or becomes effective . . . because, in such cases, the plaintiff alleges that the 'mere enactment of a statute constitutes a taking.'"[240] Even though the plaintiff did not know the dollar amount they would lose at the time the regulation was promulgated, the court found the continuing violation doctrine "inapposite" to such a Takings Clause theory, noting that the promulgation of the rule was "a single harm, measurable and compensable when the statute is passed."[241]

Clark v. City of Braidwood,[242] a Seventh Circuit case, likewise rejected a plaintiff's invocation of the continuing violations doctrine after a government authorized a third party to permanently trespass on the plaintiff's property with an underground pipe. The pipe remained,

235. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

236. *Bird*, 935 F.3d at 748.

237. *Morgan*, 536 U.S. at 114.

238. Navajo Nation v. United States, 631 F.3d 1268, 1274 (Fed. Cir. 2011) (alteration in original) (quoting Fallini v. United States, 56 F.3d 1378, 1383 (Fed. Cir. 1995)).

239. Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jiménez, 659 F.3d 42, 53 (1st Cir. 2011).

240. *Id.* at 50 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494 (1987)).

241. *Id.* at 52.

242. Clark v. City of Braidwood, 318 F.3d 764 (7th Cir. 2003).

and the plaintiff argued the continuing trespass meant the government was responsible for a continuing violation, so he could still sue.[243] The court thought otherwise: "[The plaintiff] alleges one discrete incident of unlawful conduct—the installation of the pipes on his land. That the alleged trespass is, by [the plaintiff's] description, 'permanent' does not convert that discrete act into one long continuing wrong."[244] Similarly, in *Cowell v. Palmer Township*,[245] the Third Circuit held that a suit against a municipality for imposing two liens against private property, which interfered with its development, was time-barred. The court explained that the "focus of the continuing violations doctrine is on affirmative acts of the defendants. The mere existence of the liens does not amount to a continuing violation. Neither was the [defendant's] refusal to remove the lien an affirmative act of a continuing violation."[246] On this account, the fact that the California regulation gives the State no discretion to deny a union that files the paperwork permission to enter cuts against takings liability for the government.[247] Other circuits to have considered this question agree, with courts emphasizing the government's interests in finality.[248]

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

D. *Zombie Takings Claims?*

Under our analysis, Cedar Point Nursery's suit against California should have been time-barred because the landowner's cause of action accrued in 1975, when the access regulation was promulgated. After all, the land the nursery would later acquire was zoned for agricultural uses by 1975. But other plaintiffs might have more luck with as-applied takings claims. Suppose the following facts. A 1950 law requires dairy farmers to submit to annual inspections by yogurt producers. The statute of limitations to challenge the law has long since expired. Now, in 2023, a property owner successfully re-zones residential land to permit agricultural uses and sues to challenge the 1950 law as ap-

243. *Id*. at 766.
244. *Id.* at 767.
245. Cowell v. Palmer Township, 263 F.3d 286, 293 (3d Cir. 2001).
246. *Id.*
247. *See supra* text accompanying note 68.
248. *See* Ocean Acres Ltd. P'ship v. Dare Cnty. Bd. of Health, 707 F.2d 103, 106 (4th Cir. 1983); Kuhnle Bros. v. County of Geauga, 103 F.3d 516, 521 n.4 (6th Cir. 1997). *Hensley v. City of Columbus* emphasizes that the continuing violations doctrine only applies when the government engages in subsequent affirmative acts that further damage property. Absent such "continual intervention by the state," there is no continuous violation. Hensley v. City of Columbus, 557 F.3d 693, 697 (6th Cir. 2009).

plied to him. He says no one could have sued over the application of that law to that parcel of land because at that point, the law didn't apply. Does a time-barred cause of action get resurrected as a kind of zombie takings claim under those circumstances?

Palazzolo and *Nollan* suggest that the takings claim can be resurrected. Recall that in *Nollan*, the landowners challenged the State's requirement that they provide beach access to the public as a condition for a development permit. A footnote in *Nollan* said that the landowners could bring a claim, even though "they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred his full property rights in conveying the lot."[249] As discussed more below, the *Palazzolo* Court relied on this language to hold that a regulatory takings claim transfers to a subsequent purchaser. A sensible way to understand this language is that where an access regulation does not actually apply yet to a given piece of land, an inchoate takings claim—or a zombie takings claim—can be transferred to a subsequent purchaser.[250] Based on that logic, the Court plausibly would hold that a takings claim accrues only when the access regulation is actually applied to the piece of land. Perhaps this is the meaning of *Palazzolo*'s cryptic statement that the State cannot "put an expiration date on the Takings Clause."[251]

There is some reason to think that *Nollan*'s off-the-cuff point no longer holds, at least for physical takings subject to per se rules.[252] *Nollan* was decided before *Lucas* introduced the concept of "background principles" that "inhere in the title itself,"[253] so the Court was not considering whether the existing permit scheme could be a "background principle." *Palazzolo* then held that a law does not become a background principle just because title passes to a subsequent purchaser—but it did not consider the effect of the statute of limitations or the issue of accrual. Moreover, the *Palazzolo* Court affirmed the "well settled" rule that physical takings have to be brought by the party that owned the property at the time the government authorized the physical invasion,[254] a rule we believe should have barred Cedar Point Nursery's claim (as discussed more below).

For those reasons, *Palazzolo* is a challenging, and at times anachronistic, case. The majority insisted that subsequent purchasers should be able to challenge regulatory takings, even though they could not

249. Nollan v. Cal. Coastal Comm'n, 438 U.S. 825, 833 (1987).

250. We develop these ideas further in Part IV.

251. Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

252. A facial takings claim definitely would be time-barred on these facts.

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

254. *Palazzolo*, 533 U.S. at 628 (quoting 2 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 5.01[5][d][i] (rev. 3d. ed. 2000)).

challenge physical takings: "The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic."[255] The Court's analysis in this passage is largely based on two factors: the purely regulatory nature of the alleged taking in *Palazzolo* and the uncertainty surrounding when a plaintiff can establish ripeness under the then-applicable rule of *Williamson County Regional Planning Commission v. Hamilton Bank* (which required that a plaintiff seek compensation in state proceedings and exhaust all appeals before initiating a federal suit for takings).[256]

Those factors do not apply to *Cedar Point*-style takings. *Cedar Point* limited its holding to physical invasions; the decision is inapplicable to regulatory takings.[257] And the Supreme Court in *Knick v. Township of Scott* overruled *Williamson County*, making it much easier for plaintiffs to sue in federal court over takings.[258] After *Knick*, a Takings Clause challenge to a newly enacted statute that clearly limits an owner's property rights becomes ripe upon final enactment. Challengers who file suit should immediately get their day in court, but those challengers who sleep on their rights would find the claims time barred.

Courts would do well to fashion some equitable limits on zombie takings claims. After all, the reliance interests against permitting zombie claims to emerge have force. Hence, courts generally regard as "untenable" efforts to revive causes of action based on changes in ownership or land use.[259] Real estate values are based on the highest and best permitted use of land, not merely their current uses. And if there is any probability of a re-zone that enables a shift away from land's current use to a more lucrative one, that potential change should drive up the value of land. By affecting the economic value of the highest and best use of property, newly enacted restrictions thus have immediate impacts on land values. What's more, re-zones to permit new uses of land often occur at the request of the landowner. So a landowner who asks the government to re-zone the land necessarily is requesting that land not presently subject to a regulation now be subject to a regulation. If the landowner then sues the government because the newly applicable regulation constitutes a taking, that seems

255. *Id.*

256. *Id.* at 618 (citing Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985), *overruled by* Knick v. Township of Scott, 139 S. Ct. 2162 (2019)).

257. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2076–77 (2021).

258. *Knick*, 139 S. Ct. at 2177–79.

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

like the definition of *chutzpah*.[260] And if governments can become liable under the Takings Clause for granting such requests from landowners, then they may respond by refusing to re-zone property more generally. That outcome would diminish everyone's welfare.

Formalist and structural arguments further strengthen the idea that some regulations and statutes are too old to be challenged as takings. Consider the fact that the federal government and state governments generally can acquire private property via adverse possession.[261] More than one court has held that it would be incongruous for the law to treat government invasions of property that persisted for long enough to satisfy the adverse possession requirements as takings claims that could be brought after the adverse possession statute of limitations expired.[262] Both adverse possession by the government and statutes of limitations more generally serve the same deep structural interest in property law—the importance of finality in determinations about who owns what and the scope of the government's authority. The ability of the government to obtain land via adverse possession shows that the Takings Clause can have an expiration date, at least where physical takings claims are concerned.

Striking the right balance thus entails a recognition of two principles in a world where both land uses and highest-and-best uses can change over time: (1) In some cases, it is unreasonable to expect a landowner to sue right away when a restriction interferes with hypothetical future uses of their land, and (2) laws may reduce property values immediately because they limit the highest and best future use of land, and it will sometimes be appropriate to extinguish future causes of action arising under those laws for reasons of efficiency or equity.

In any event, if a court were to recognize zombie takings claims, the remedy for idiosyncratically situated owners would be limited to damages. Such owners would not be able to bring a facial challenge against the taking, nor should they obtain injunctive relief on behalf of a large number of property owners whose own claims would be time-barred.[263] If zombie takings claims are cabined in that way, then using

260. The behavior is analogous in some ways to "coming to the nuisance." *See* RESTATEMENT (SECOND) OF TORTS § 840D (AM L. INST. 1979).

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

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

263. See Gilbert v. City of Cambridge, 932 F.2d 51, 57 (1st Cir. 1991) ("The argument is meritless. To prevent plaintiffs from making a mockery of the statute of limitations by the simple expedient of creative labelling—styling an action as one for declaratory relief rather than for damages—courts must necessarily focus upon the substance of an asserted claim as opposed to its form. It is settled, therefore, that where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy.").

statutes of limitations to demarcate background principles of property law still provides government with the benefits of finality and predictability, capping any liability that could occur decades after the enactment of a problematic statute or regulation.[264]

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

Part III suggests that Cedar Point Nursery and Fowler Packing's takings claim accrued in 1975, when the access regulation was promulgated and made applicable to the land. But one could imagine a situation in which a landowner sold their farm immediately after the access regulation was promulgated. If that happened, the claim could be barred by a different rule. As noted, where a purchaser acquires property after a regulatory taking, they may challenge that taking. Where a purchaser acquires property after a *physical* taking, however, the claim for compensation does not pass to them; it remains with the original owner. This important distinction is presently the law of the land. Yet it is not certain whether the Supreme Court would apply this black letter rule to permanent but part-time physical invasions, the newly recognized per se takings from *Cedar Point*. Assuming the existing rule applies to all physical takings, it offers another reason why *Cedar Point* has limited reach.

This distinction between regulatory and physical takings for post-taking purchasers is somewhat under-theorized, but both the Supreme Court and scholars have assumed it holds true.[265] The distinction was explicitly discussed in *Palazzolo v. Rhode Island*.[266] There, the plaintiff alleged that the application of a state wetlands regulation to his property worked a taking because (1) it prohibited all development of the land, thus depriving him of all economic use under *Lucas*; and (2) it was a regulatory taking under *Penn Central*.[267] This seems like a straightforward takings claim, except that title to the property had passed to the plaintiff after the regulation went into effect.[268]

264. *Cf.* Gabelli v. Sec. & Exch. Comm'n, 568 U.S. 442, 448–49 (2013) ("Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' They provide 'security and stability to human affairs.' We have deemed them 'vital to the welfare of society' and concluded that 'even wrongdoers are entitled to assume that their sins may be forgotten.'" (citations omitted) (first quoting Ord. of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944); then Wood v. Carpenter, 101 U.S. 135, 139 (1879); and then Wilson v. Garcia, 471 U.S. 261, 271 (1985))).

265. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001); Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. Haw. L. Rev. 533, 576 (2002); Gregory M. Stein, *The Modest Impact of* Palazzolo v. Rhode Island, 36 Vt. L. Rev. 675, 688–89 (2012).

266. *See generally Palazzolo*, 533 U.S. 606.

267. *Id.* at 615–16.

268. *Id.* at 616.

The court below, the Rhode Island Supreme Court, held that the plaintiff's "postregulation acquisition of title was fatal" to both his claims.[269] In rejecting his *Lucas* claim, the Rhode Island Supreme Court found that because the plaintiff acquired the land after the promulgation of the regulation, it constituted a "background principle of state law," and therefore could not be a taking.[270] On the *Penn Central* claim, the Rhode Island Supreme Court held that because the plaintiff was on notice of the regulation, it could not interfere with his reasonable investment-backed expectations.[271] These "two holdings together amount to a single, sweeping, rule: A purchase or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking."[272]

The Court rejected this rule in the regulatory takings context because it "put an expiration date on the Takings Clause."[273] The Court explained:

> Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. . . . Future generations, too, have a right to challenge unreasonable limitations on the use and value of the land.[274]

The Court worried that under the State's rule, a takings claim could not be asserted where an owner attempted to challenge a regulation but could not "survive the process of ripening his or her claim" before transferring the property.[275] It "would work a critical alteration to the nature of property" if the landowner could not transfer their full interest in the property—including the inchoate takings claim—to a new party.[276] The plaintiff's claim only became ripe after he acquired title and his applications for development were rejected: "A blanket rule that purchasers with notice have no compensation right *when a claim becomes ripe* is too blunt an instrument to accord with the duty to compensate for what is taken."[277] Such a rule would allow the State to

269. *Id.* at 626 (citing Palazzolo v. State *ex rel.* Tavarez, 746 A.2d 707, 716 (R.I. 2000)).

270. *Id.* at 629; *see also State ex rel. Tavarez*, 746 A.2d at 715–716 ("[W]hen Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired.").

271. *Palazzolo*, 533 U.S. at 616 (citing *State ex rel. Tavarez*, 746 A.2d at 717).

272. *Id.* at 626.

273. *Id.* at 627. The Court did not acknowledge that the statute of limitations is itself an expiration date on the Takings Clause. A more recent Supreme Court decision, *Tyler v. Hennepin County*, 143 S. Ct. 1369 (2023), indicates that statutes of limitations and related procedural hurdles can impose effective expiration dates on otherwise viable Takings Clause claims. *See supra* text accompanying notes 210–14.

274. *Palazzolo*, 533 U.S. at 627.

275. *Id.*

276. *Id.*

277. *Id.* at 628 (emphasis added).

"secure a windfall for itself."[278] Though the Court did not say as much, it is possible to read the Court's rule as limited to those cases where the claim became ripe only after the property was acquired; if a regulatory takings claim was ripe prior to the acquisition of title, it still could be barred.[279] The Court also noted that the timing of the regulation being challenged and the plaintiff's acquisition of the affected land were relevant to the takings analysis. They just couldn't be dispositive.[280]

Consistent with this emphasis on ripeness, the Court very clearly distinguished one situation where "[f]uture generations" do *not* have a right to challenge state action: physical takings.[281] Challenges to land-use regulation do not "mature until ripeness requirements have been satisfied."[282] In contrast, physical takings ripen immediately: "In a direct condemnation action, or when a State has physically invaded the property without filing suit, the fact and extent of the taking are known."[283] As such, the "general rule [for physical takings] . . . [is] that any award goes to the owner at the time of the taking, and . . . the right to compensation is not passed to a subsequent purchaser."[284]

As noted, this rule only applies when the easement (or quasi-easement) has already been imposed. It does not apply where the land is merely subject to a regulation under which the government could impose an easement sometime in the future. The *Palazzolo* Court's discussion of *Nollan* is instructive. In *Nollan*, a state regulatory agency "require[d] oceanfront landowners to provide lateral beach access to the public as the condition for a development permit."[285] At the time the landowners purchased their property, this regulation was already in place, but the prior owner had never sought a permit, so there was

278. *Id.* at 627.

279. *See* Stein, *supra* note 265, at 691–92.

280. *See Palazzolo*, 533 U.S. at 629–32; *see also id.* at 633 (O'Connor, J., concurring) ("Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance.").

281. *Id.* at 627 (majority opinion).

282. *Id.* at 628.

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

284. *Palazzolo*, 533 U.S. at 628 (citing Danforth v. United States, 308 U.S. 271, 284 (1939)). Though the Court's reference to a "general rule" might suggest it is a rule with exceptions, neither *Palazzolo* nor the *Danforth* case on which it relies mention any such exceptions. *See Danforth*, 308 U.S. at 284 ("For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or late date, receives the payment."). *Danforth* is short on analysis.

285. *Palazzolo*, 533 U.S. at 629.

no easement on the land. The *Palazzolo* Court explained that the prior owner could transfer a kind of inchoate takings claim to the Nollans: "So long as the Commission could not have deprived the prior owners of the easement without compensating them, . . . the prior owners must be understood to have transferred their full property rights in conveying the lot."[286] But based on the other discussion in *Palazzolo*, the claim would not have transferred if the agency had already imposed the easement. This rule echoes the Court's observation in *Lucas* that the Takings Clause is not violated if the government merely "permit[s] the government to assert a permanent easement that was a preexisting limitation upon the landowner's title."[287] If that government takes an easement, the original owner can bring a claim, but once title transfers, the restriction inheres in the subsequent purchaser's title.

Palazzolo thus held that while a property owner who acquires title after a *regulatory* taking may still challenge that regulation, a property owner who acquires title after a *physical* taking has no analogous right. (The party that owned the land when the physical taking occurred, however, may challenge the regulation after they have already sold the land, assuming a suit is not barred by the statute of limitations.[288]) Applying these lessons to *Cedar Point*, if the regulation at issue constituted a physical taking, then "any award [should go] to the owner at the time of the taking, and . . . the right to compensation is not passed to a subsequent purchaser."[289] (Unlike in *Nollan*, the access regulation already applied to the land, so the quasi-easement already had been imposed, and therefore, the restriction on the land's use inhered in title.) This is the natural consequence of viewing the access regulation as a physical, rather than a regulatory, taking: The rule prohibiting physical takings claims from passing to subsequent purchasers bars Cedar Point Nursery's claim.

To summarize, *Cedar Point* was premised on faulty assumptions that the proper plaintiffs had filed their suits in a timely manner. Under well-established law that was left untouched by the *Cedar Point* Court, similarly situated plaintiffs should lose claims they bring. As a matter of legal realism, the Supreme Court could, of course, overrule *Palazzolo*, reject *Fallini* and the many cases that follow it, and upend two separate bodies of law that have been uncontroversial for decades. As we have seen in recent terms, Supreme Court precedents are binding up until the moment when five justices decide they

286. *Id.* at 629 (quoting Nollan v. Cal. Coastal Comm'n, 438 U.S. 825, 834 n.2 (1987)).

287. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992).

288. *Cf.* Stein, *supra* note 154, at 105.

289. *Palazzolo*, 533 U.S. at 628.

are not.[290] Indeed, *Cedar Point* arguably ignores the Constitution's text and original public meaning,[291] so some of the guardrails that could constrain results-oriented judging are absent in the Takings Clause context. Yet the *Cedar Point* majority felt constrained to at least pretend that its decision was consistent with earlier precedents, and if the Court did gut statutes of limitations defenses in takings suits, there could be spillovers to civil cases where the Supreme Court majority is more sympathetic to defendants. More importantly, the statute of limitations and accrual issues are likely to percolate in the lower courts for quite a while before the Supreme Court weighs in, so the current accrual and statute of limitations doctrines could remain well-established for decades, even if the Court does eventually disavow *Fallini* and *Palazzolo*.

Alternatively, the Court could pursue a superficially less extreme tack, holding that although *Cedar Point* treats temporary physical invasions like permanent physical occupations, such that both are per se takings, *Palazzolo* should be understood to treat part-time physical invasions like regulatory takings, so an owner who acquired land after the physical taking cause of action accrued can still sue. To be sure, that effort to distinguish *Palazzolo* would be curious because the main point of *Palazzolo* is that regulations generally should be subject to balancing tests rather than per se rules, and *Cedar Point* tells us that in the domain of permanent physical invasions, per se rules apply exclusively. For that reason, simply rejecting the Federal Circuit's *Fallini* line of authority is probably the path of least resistance for a Supreme Court interested in using *Cedar Point* as an "opening salvo in a war against the regulatory state."[292]

Yet there is reason to think that the Supreme Court's present conservative majority does not have five Justices who wish to use the Takings Clause to gut longstanding federal antidiscrimination laws, labor

290. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling both Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)); Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (overruling both Apodaca v. Oregon, 406 U.S. 404 (1972), and Johnson v. Louisiana, 406 U.S. 356 (1972)); Knick v. Township of Scott, 139 S. Ct. 2162 (2019) (overruling Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019) (overruling Nevada v. Hall, 440 U.S. 410 (1979)); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)). In other contexts, a majority of the Supreme Court has proven itself willing to disrupt longstanding doctrinal frameworks, probably with an eye towards reaching ideologically congenial results. *See* Shelby County v. Holder, 570 U.S. 529 (2013).

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

292. Mahoney, *supra* note 12, at 11.

laws, environmental laws, and the like.[293] The legal arguments we identify supply what's missing from *Cedar Point* itself, a coherent limiting principle that renders its holding important rather than revolutionary. *Cedar Point* makes it easier for landowners to win takings claims by shifting cases that previously would have been governed by a balancing test over to a per se test that's far friendlier to landowners. Per se tests simplify the law and remove some otherwise relevant equitable considerations from the calculus. It has long been the case that if landowners wished to benefit from these per se tests, they could not sleep on their rights. They had to sue promptly in response to the government action that diminished their property rights, even when there was a time lag between the creation and exercise of third-party entry rights. *Cedar Point* does not and should not change that reality.

V. WHY TREAT PHYSICAL AND REGULATORY TAKINGS CLAIMS DIFFERENTLY?

There is strong doctrinal support for the notion that the claims in *Cedar Point* were barred under the *Fallini* and *Palazzolo* principles. For those concerned about the implications of *Cedar Point*, these timing rules might seem like a good idea because they can save existing laws now at risk. But these timing rules were established before *Cedar Point* expanded the world of physical takings, and a skeptical reader may wonder if the justifications underlying these rules still make sense. So it is worth grappling with the policy-related justifications for the two timing rules.

A. *Normative Justifications for the Cause of Action Accrual Rules*

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

The answer ought to be no, for several reasons. First, the promulgation of a legal rule eliminating a property owner's right to exclude should have immediate negative effects on the value of the owner's land. Empirical work by Jonathan Klick and Gideon Parchomovsky validates this claim by analyzing the enactment of a "right to roam" law in England and Wales that prohibited landowners from excluding hikers from certain private property.[294] Because roaming rights did

293. *See supra* notes 17, 123–24 and accompanying text.

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

not arise on all private property, Klick and Parchomovsky were able to identify the economic effects on parcels that were more likely to be subject to new third-party roaming rights and those that were not.

Critically, for our purposes, Klick and Parchomovksy keyed on the law's enactment date, rather than its subsequent implementation dates, to analyze the real estate price effects of weakening the right to exclude.[295] They found an immediate, negative, and statistically significant effect on real estate prices in those areas where the right to roam affected much of the land, compared to those areas where few parcels were affected. On average, the right-to-roam law's enactment immediately brought about a permanent decline of roughly 5–6% in real estate prices in parts of England and Wales where many properties were subject to the law.[296] The authors concluded that the data reveals a causal connection between the enactment of the law and the immediate, statistically significant decline in real estate values.[297] In short, the experience from the United Kingdom suggests that when the government substantially restricts owners' rights to exclude third parties, real estate markets respond swiftly and efficiently. Landowners feel the economic pain as soon as the statute is enacted, not at a later date when the third parties exercise their new rights to enter private property. Other empirical research similarly shows that real estate markets adjust swiftly to the enactment of new laws.[298]

To be sure, British law did not provide landowners with the sorts of robust rights to sue over takings that exist under American law.[299] Hence, when English or Welsh landowners were subject to the right to roam, the immediate loss in property values was the result of a simultaneous loss of a property right and absence of a cause of action to recover just compensation for the loss. But as we read *Palazzolo*, American land markets should behave similarly. That is, if an American jurisdiction enacted a right to roam, authorizing a permanent physical invasion of a private property owner's rights, only the landowner who held title to the property at the time roaming rights were created would be able to sue.[300] If that landowner tried to sell the

295. *Id.* at 948.

296. *Id.* at 952, 956, 958.

297. *Id.* at 960 ("As with England, the results for Wales suggest that the passage of the right to roam statute in 2000 led to substantial declines in real estate prices in those countries and municipal authorities where a relatively large fraction of the land area was designated as access land. The fact that most of the change occurred quickly after the passage of the statute enhances our confidence that the identified relationship can be interpreted causally.").

298. *See, e.g.*, Rebecca Diamond et al., *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 AM. ECON. REV. 3365 (2019), https://doi.org/10.1257/aer.20181289; Anup Malani, *Valuing Laws as Local Amenities*, 121 HARV. L. REV. 1273 (2008).

299. *See* Klick & Parchomovsky, *supra* note 294, at 923.

300. *See supra* Part IV.

land, she would retain any takings claim,[301] a subsequent purchaser would be unable to obtain that claim, and as a result, the price a rational buyer would be willing to pay for the land would decline in a manner that reflected the law's interference with the right to exclude. Any non-trivial restriction on the right to exclude that implicates the foreseeable highest and best use of land should generate some kind of negative market response. This market response in turn provides highly probative evidence for courts that must calculate just compensation.[302]

Because real estate prices are responsive to regulations that limit both current and foreseeable uses of land, the accrual analysis for takings claims differs from other kinds of constitutional claims. A limit on free speech rights or gun rights may not bite until a person's liberty is infringed. Thus, the government has no statute of limitations defense if a law enacted decades ago is challenged by a plaintiff who was not alive at the time of enactment and against whom it is now being enforced.[303] But restrictions on rights to exclude immediately affect property values and alter the owner's bundle of rights, even where the owner's current uses are unaffected. The reduction in property values is the precise harm that the Takings Clause's just compensation requirement remedies. Hence, statutes of limitations begin to run upon enactment of the rule restricting property rights.

This fundamental economic reality is already reflected in Supreme Court doctrine. The Court recently explained in *Knick*:

> We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken. . . . And we have explained that the "act of taking" is the "event which gives rise to the claim for compensation."

301. *Cf.* Stein, *supra* note 154, at 105.

302. There is a distinction between probative and perfectly informative. In certain instances the level of compensation required under the Constitution and the negative market response will diverge. For example, even if new purchasers had the same rights to sue for takings as people who owned property when the law limiting their exclusion rights was enacted, land purchasers might not want to incur the expenses and inconvenient delays associated with takings litigation, not to mention the risk of an erroneous legal decision. So we could expect land that is unrestricted to be worth more than land that is restricted but comes with an appurtenant takings claim. Alternatively, there are some negative market responses that would not figure into just compensation. For example, prices for agricultural land in California may have declined after the union access provision was put into place because the provision made successful unionization efforts more likely, and unionization generally produces higher wages that reduce farmers' profits. That economic loss would not be one that is compensable under the Takings Clause. *See* Kelman, *supra* note 136, at 142–49.

303. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122, 2156 (2022) (striking down a New York law limiting rights to carry concealed weapons that dated to the early 1900s).

> The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner.[304]

> Note that the statute of limitations for takings claims generally starts to run when a cause of action "first accrues."[305] *Knick* itself is instructive.

The case involved a local government rule that required cemetery owners to keep their land open to the public during daytime business hours, and the plaintiff was a rural landowner whose land contained a small graveyard where some of her neighbors' ancestors were buried.[306] She objected to the township's rule, alleging that the ordinance itself constituted a taking of her property.[307] The Supreme Court held that she could sue right away, never entertaining the notion that her claim was not ripe until third parties showed up during daytime hours and demanded entry onto her land.[308] We can understand *Knick* as a hallmark of the Court's impatience with state court proceedings regarding rights and compensation. If the Court in *Knick* is telling the parties to get on with it, then recognizing that the owner should sue upon the enactment of a statute or regulation authorizing third-party entry makes sense.[309] But *Knick* also holds that the right to compensation arises when the property is taken—and in *Cedar Point*, that means the moment the right of access is infringed upon through the regulation.

Moreover, a takings suit is brought against *the government*. Once the government enacts a statute or regulation that authorizes third parties to enter private property, the State's work is essentially done. Whether third parties decide to exercise those rights is up to the third parties, not up to the State.[310] This formalist argument was a large

304. Knick v. Township of Scott, 139 S. Ct. 2162, 2170 (2019) (quoting United States v. Dow, 357 U.S. 17, 22 (1958)).

305. The Tucker Act employs this "first accrues" language, which the Supreme Court has regarded as meaningful. *See* Franconia Assocs. v. United States, 536 U.S. 129, 144–45 (2002) (discussing 28 U.S.C. § 2501).

306. *Knick*, 139 S. Ct. at 2168.

307. *Id.*

308. *Id.* at 2172–73.

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

310. Ironically, in *Cedar Point* itself, the United Farm Workers did not follow the legal process to obtain permission to enter Cedar Point Nursery's land. *See supra* text accompanying note 80. By failing to satisfy the requirements of the regulation being challenged, the union was trespassing. It is hard to come up with a theory for how that trespass is the government's fault. Cedar Point Nursery nonetheless sought injunctive relief based on the plausible fear that the union would properly follow the regulation and seek to enter their property in the future. *See* Cedar Point Nursery v. Gould (*Gould I*), No. 1:16-cv-00185-LJO-BAM, 2016 WL 1559271, at *1–2 (E.D. Cal. Apr. 18, 2016).

part of the basis for the *Fallini* line of authority,[311] and we think it's an intuitive one. Recall the admonition that "[w]hat a plaintiff 'may challenge under the Fifth Amendment is what the government has done, not what [third parties] have done.'"[312] Of course, the government may be called upon at a later date to enforce an existing law or adjudicate a dispute about its meaning. Perhaps a landowner prohibits the third party from entering the premises, contrary to the statute or regulation, as was the case with Fowler Packing.[313] And the union organizers in turn ask the police to accompany them to the premises to prevent violence. At that point, the State is not newly limiting property rights—it is enforcing use rights that were previously reallocated. As the Supreme Court itself noted in *Cedar Point*, the government isn't liable under the Takings Clause for a physical invasion when its agents enter private property to enforce criminal law, nor when its agents execute a search or arrest warrant.[314] The same principle precludes a constitutional violation when state agents merely keep the peace by enforcing longstanding entitlements.

A Takings Clause violation presupposes more active government involvement, such as the government's repudiation of a promised contract right,[315] or its agents' entry onto land to seize something other than evidence or an arrestee.[316] When the government triggers the Takings Clause by authorizing a third party's entry, whether a third party ever shows up to exercise a right to enter the premises affects only the question of damages, not government liability.[317]

This formalist argument is closely related to a pragmatic argument: Allowing landowners to sue right away results in more government accountability and more certainty in property rights. If property owners can sue when a statute is enacted, the officials who enacted the policy are more likely to be in office when any negative fiscal repercussions arise, and so voters are able to hold them accountable for their actions. Relatedly, as the Federal Circuit has explained, "as a practical matter, it will often be much easier for the parties to correct a wrongful taking if litigation is initiated *before* its effects are felt."[318] Permitting early legal challenges thus may lead the government to repeal problematic laws promptly, especially if courts hold that none of

311. *See supra* notes 158–93 and accompanying text.

312. Navajo Nation v. United States, 631 F.3d 1268, 1274 (Fed. Cir. 2011); *see also supra* text accompanying note 166.

313. *See Shiroma II*, 956 F.3d 1162, 1166 (9th Cir. 2020) (Ikuta, J., dissenting from the denial of rehearing en banc).

314. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021).

315. *See* Franconia Assocs. v. United States, 536 U.S. 129, 148 (2002).

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

317. *See* Ladd v. United States, 630 F.3d 1015, 1023–25 (Fed. Cir. 2010).

318. *Goodrich*, 434 F.3d at 1336.

the existing *Cedar Point* exceptions apply. Any of those outcomes lead to more certain property rights.

Another pragmatic consideration supports the *Fallini* principle: In many instances where a government authorizes third parties to invade private property, and then at a later date a third party does enter the property at issue, it is often the owner, rather than the government, whose actions influenced the probability of a third-party entry. *Cedar Point* is instructive in that respect. Unions are resource-constrained; they do not target workplaces at random. Rather, they identify workplaces where they are relatively likely to succeed and where the benefits of successful unionization will be particularly high.[319] These metrics are in turn influenced by choices that employers make about pay, benefits, job security, the perceived fairness of grievance and disciplinary procedures, and the treatment of workers.[320] Though the federal government may exercise some influence over unionization via the National Labor Relations Board, the typical state or local government entity plays essentially no role in determining whether union organizers will target a particular property owner. In that sense, the property owner, rather than the governmental defendant, is the least cost avoider of eventual third-party entries. Indeed, Fowler Packing, one of the plaintiffs in *Cedar Point*, had a rather checkered history as an employer, having been involved in various disputes with employees over the years involving its failure to pay minimum wage, to log worker hours accurately, to pay workers what they were owed by contract, and to provide the rest periods required by law.[321] When an employer engages in these kinds of practices, it materially increases the risk that labor organizers will target the company for a unionization campaign.

This analytical move is applicable beyond labor unions to other kinds of third-party entrants, including hunters (who in many states are permitted to enter private property),[322] housing discrimination

319. *Cf.* Thomas F. Reed, *Do Union Organizers Matter? Individual Differences, Campaign Practices, and Representation Election Outcomes*, 43 INDUS. & LAB. RELS. REV. 103, 106–07 (1989), https://doi.org/10.1177/001979398904300109 (describing the Machiavellian attributes of successful union organizers).

320. *See* Steven L. Blader, *What Leads Organizational Members to Collectivize? Injustice and Identification as Precursors of Union Certification*, 18 ORG. SCI. 108, 122–23 (2007), https://doi.org/10.1287/orsc.1060.0217; Herbert G. Heneman III & Marcus H. Sandver, *Predicting the Outcome of Union Certification Elections: A Review of the Literature*, 36 INDUS. & LAB. RELS. REV. 537, 551 (1983), https://doi.org/10.2307/2522929; John A. McClendon, Hoyt N. Wheeler & Roger D. Weikle, *The Individual Decision to Unionize*, LAB. STUD. J., Sept. 1998, at 34, 46, https://doi.org/10.1177/0160449X9802300302.

321. *See* Aldapa v. Fowler Packing Co., 310 F.R.D. 583, 586–87 (E.D. Cal. 2015); Fowler Packing Co. v. Lanier, 844 F.3d 809 (9th Cir. 2016).

322. *See, e.g.*, Richard M. Hynes, *Posted: Notice and the Right to Exclude*, 45 ARIZ. ST. L.J. 949, 951–52 (2013); Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549 (2004).

"testers" sent by governments or civil rights organizations,[323] undercover journalists,[324] lawyers,[325] health care professionals,[326] and various other sorts of third parties who may seek to enter private property pursuant to a government rule or license. In each of these instances, the actions of a property owner will meaningfully affect the likelihood that a third-party right to enter will be exercised. Admittedly, this logic doesn't apply to all access regulations, such as those involving protected species' habitats or avigation easements.

There are a few good responses to these arguments. First, a property owner usually is more likely to notice the physical entry of a third party onto their property than the government's enactment of a statute or promulgation of a regulation. We think that argument is probably correct as a descriptive matter, but not decisive, given the strength of the competing considerations.

The battle over whether ignorance of the law is a defense ended in a rout long ago,[327] and in the regulatory takings context, there are countless cases where a landowner had a plausible argument that a regulation worked an unconstitutional taking, but the landowner waited too long and therefore lost the opportunity to receive compensation.[328] There is nothing unique about this practice. It is essentially a foundational rule in the American legal system, one backed by the legal system's interest in finality. When there is ambiguity about the meaning of a statute of limitations, the Supreme Court generally "adopt[s] the construction that starts the time limit running when the cause of action . . . accrues."[329] And causes of action generally accrue when a reasonably diligent plaintiff would have discovered their cause of action.[330] In the administrative law context, publication of a rule in the Federal Register provides sufficient notice to affected parties.[331] Landowners have constructive notice of laws promulgated at the federal, state, and local level, just as purchasers have constructive notice

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

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

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

326. *See, e.g.*, *id.*

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

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

329. Rotkiske v. Klemm, 140 S. Ct. 355, 360 (2019) (second alteration in original) (quoting Graham Cnty. Soil & Water Conservation Dist. v. United States, 545 U.S. 409, 418–19 (2005)).

330. *See* Gabelli v. Sec. & Exch. Comm'n, 568 U.S. 442, 452–53 (2013).

331. 5 U.S.C. § 533(b); 36 C.F.R. § 902.21 (2019).

of properly recorded deeds, even if they did not actually discover those deeds.[332]

This type of demanding due-diligence requirement can be found elsewhere in property law, too. Just this Term, the Supreme Court took a variation of this rule for granted in *Wilkins v. United States*.[333] There, the Forest Service allowed the general public to access an easement on the petitioners' land.[334] The petitioners brought a suit under the Quiet Title Act, arguing that allowing public access exceeded the original terms of the easement.[335] The district court held that the claim was barred by the statute of limitations, and it dismissed the case because it held the time limit was jurisdictional.[336] The Supreme Court reversed, holding that the time limit was not jurisdictional.[337] But all these courts took for granted that the claim had accrued years earlier. The Quiet Title Act says that a claim accrues when "the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."[338] The district court and the Ninth Circuit agreed that the claim accrued at the latest in May 2006 in part because "historic maps should have alerted a reasonable landowner of the government's view" that the public had access to the easement on their land.[339] That was true, even though the public only began to seriously use the road after 2006. And a statute or regulation that grants a right of access arguably provides much better notice than a "historic map."

A skeptical reader might also argue that it will be difficult to calculate the amount of just compensation due when the regulation is enacted. In determining the compensation that's due to Cedar Point Nursery, one might want to know: Would union organizers actually take advantage of their right of access? How often? But the same objections could be raised any time a landowner seeks compensation for an easement. Whereas total, physical appropriation of property—for instance, when the government appropriates property to build a highway—may have clear, immediate effects, one could argue that the cost of an easement will always depend on the number of people that access the property at any given time. The Court, however, has never adopted a rule that a takings claim for an easement only ripens when it is used. Indeed, in *Knick*, the Court implicitly endorsed the opposite rule.[340]

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

333. Wilkins v. United States, 143 S. Ct. 870 (2023).

334. *Id.* at 875.

335. *Id.*

336. *Id.*

337. *Id.* at 881.

338. 28 U.S.C. § 2409a(g).

339. Wilkins v. United States, No. 20-35745, 2021 WL 4200563, at *2 (9th Cir. Sept. 15, 2021).

340. *See supra* text accompanying notes 308–09.

It's also often true that the amount of damages will be more certain as time passes. Imagine that a plaintiff alleges that a household product gave her cancer, and she seeks damages based on the cost of her current and future medical bills. It will always be difficult to account for her future medical bills at the time of trial, but it's clear that the claim accrued when she first got sick—not when her damages could be certain. The Federal Circuit has explained:

> [E]ven though a plaintiff might not be aware of the full economic cost of a taking at the time it occurs, for purposes of determining when the statute of limitations begins to run, the 'proper focus' must be 'upon the time of the defendant's acts, not upon the time at which the consequences of the acts become most painful.'[341]

The court held that the cause of action arose when it should have been clear to the landowner that it had lost the right to exclusive control of the property, not when the full economic cost of that loss was known.[342]

Moreover, depending on the way a court calculates just compensation, it's not obvious that additional time is necessary. There are at least two plausible ways to calculate the just compensation due for a *Cedar Point* taking that do not require any specific information about the amount of time the quasi-easement is actually used. Lee Fennell suggests that the amount of compensation due might be calculated by relying on the "rental value of the land" as a "rough point of reference," and she calculates that rental value based on the maximum amount of time a union organizer could spend on the land in a given year.[343] Alternately, a court could rely on the well-established method for calculating the value of a permanent easement: the "market value of the property before and after" the easement is imposed, to be paid out in a lump sum.[344] Like Fennell's rental value, the decrease in market value is calculated by considering the amount of access granted in the abstract, not the amount of time the easement is actually used in practice.[345] Under either approach, the calculation could easily be done on the day the statute is enacted.

In short, though it might be tempting to say that the abrogation of a right to exclude does not occur until the moment a third party physically invades the owner's land, that conclusion is out of step with both the existing law and widely adopted, broadly applicable rules regard-

341. Navajo Nation v. United States, 631 F.3d 1268, 1277 (Fed. Cir. 2011) (quoting Delaware State Coll. v. Ricks, 449 U.S. 250, 258 (1980) (alterations omitted)).

342. *Id*. at 1276.

343. Fennell, *supra* note 12, at 55–56.

344. United States *ex rel.* Tenn. Valley Auth. v. Indian Creek Marble Co., 40 F. Supp. 811, 821 (D. Tenn. 1941). In contrast, the "most widely accepted measure of compensation" for a temporary easement—meaning an easement with an end date—is the "rental value of the property taken." 9 NICHOLS ON EMINENT DOMAIN § G32.08[1][a], LEXIS (database updated 2023).

345. *See Indian Creek Marble*, 40 F. Supp. at 821.

ing the accrual of causes of action. If they wish to challenge the enactment of a law or the promulgation of a regulation as a per se taking, landowners need to sue promptly,[346] especially after *Knick*. In short, the *Fallini* rule makes sense for temporary invasions of the sort that occurred in both *Fallini* itself and *Cedar Point*.

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

This brings us to the second key doctrine in takings law, the idea that while a regulatory takings cause of action gets transferred to the new owner along with the underlying property, a physical takings cause of action can be brought only by the party that owned the land when the cause of action first accrued. The Supreme Court endorsed this principle in *Palazzolo*, although at the time it was not obvious to everyone that the category of per se physical takings included permanent, part-time invasions like the ones that occurred in *Cedar Point*.[347] On balance, we aren't convinced that this part of *Palazzolo* is normatively attractive, though there are sensible arguments in both directions.

The distinction between regulatory and physical takings for timing purposes is somewhat under-theorized, but property scholars have offered some plausible justifications for distinguishing between the two. First, as discussed in Part II, it is more difficult to determine when a regulatory taking occurs. Carol N. Brown argues that this ambiguity is one reason to allow subsequent purchasers to pursue regulatory takings claims: "The nature of regulatory takings creates ambiguity as to when a taking has occurred and as to the extent of the regulation's effect on the owner's property."[348] Physical takings, in contrast "occur at a discrete point in time and are therefore more readily discernable and identifiable by the involved parties."[349] Gregory Stein echoes this justification, noting that physical takings "crystallize at a distinct moment"[350] and "the date of the taking is easy to determine."[351] These scholars do not explain why this should matter for the transferability analysis, but the argument seems to flow naturally: Ambiguity at the time of sale over whether a cause of action has accrued could chill transactions and prevent a resource from getting to its highest and best user. This argument is no longer true for physical takings after *Knick* (as we read it) and *Cedar Point*. A physical takings suit against the government always arises when the legal rule authorizing third-

346. Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 687–89 (9th Cir. 1993); *Navajo Nation*, 631 F.3d at 1273–74.

347. *See supra* text accompanying notes 283–89.

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

349. *Id.*

350. Stein, *supra* note 265, at 684.

351. *Id.* at 689.

party entry is enacted. With such a simple, straightforward rule, there is no reason to think that welfare-enhancing property transactions would be chilled.

Second, Brown, Stein, and the *Palazzolo* Court further distinguished between physical and regulatory takings based on concerns of ripeness. The effect of a regulation may not be immediately clear, so a regulatory takings claim may not become ripe until after the sale. The *Palazzolo* Court explained it would be "illogical[ ] and unfair" to bar a subsequent purchaser from pursuing a takings claim "where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner."[352] In a physical takings case, in contrast, "the fact and extent of the taking are [immediately] known."[353]

Once again, a takings claim based on an access regulation should accrue immediately. Under the Court's existing approach to ripeness, the claims should also ripen at that point.[354] For a takings claim to be ripe, "the government entity charged with implementing the regulations [must] reach[ ] a final decision regarding the application of the regulations to the property at issue."[355] This final decision informs the takings analysis: The court cannot determine whether, for instance, a zoning ordinance has defeated reasonable, investment-backed expectations without knowing "'the extent of permitted development' on the land in question."[356] This final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer."[357] Where the "unequivocal nature" of the regulation is clear, however, there is no argument that the government will "soften" it,[358] and the claim is ripe. An open-ended access regulation like that in *Cedar Point* is unequivocal: It grants a right of access in the circumstances delineated by statute. Thus, it should ripen immediately.

One might push back and argue that the "fact and extent" of the taking were not immediately clear when *Cedar Point*'s access regula-

352. Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001).

353. *Id.*; *see also* Stein, *supra* note 265, at 684–85; Brown, *supra* note 348, at 24–26.

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

355. *Palazzolo*, 533 U.S. at 618 (quoting Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985)).

356. *Id.* (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1986)).

357. *Id.* at 620 (quoting Suitum v. Tahoe Reg'l Plan. Agency, 520 U.S. 725, 738, (1997), *overruled on other grounds by* Knick v. Township of Scott, 139 S. Ct. 2162 (2019)).

358. *See id.* at 619–20.

tion was enacted. But as explained above, that issue arises whenever courts try to calculate the just compensation due for an easement, and the Court has never adopted a rule that a claim for an easement only ripens when it is used.

Yet there are reasons to think that even a physical takings claim should be able to transfer, regardless of the distinctions above. Some judges and scholars have suggested that given the cost of pursuing a takings claim, property owners should be able to transfer the claim to a subsequent purchaser.[359] For instance, Judge Wesley on the Court of Appeals of New York has suggested that property owners who lack "the resources to commence a taking[s] action" should be able to transfer their property to another party "without destroying the property's value."[360]

In his classic article on the alienability of legal claims generally, Michael Abramowicz points to a key justification for legal rules proscribing the buying and selling of causes of action: asymmetric information.[361] The party that suffered a legal wrong will often have better information about the nature of its injury than anyone else would. The resulting adverse selection can chill market transactions. Of course, for the reasons we specified above, a physical takings claim based on the enactment of a legal rule should not produce a substantial information asymmetry—the applicable rules can be determined just as easily by the buyer and seller, and a buyer may actually engage in more due diligence with respect to the law than a current property owner would so as to figure out how much the property is worth. On the other hand, there may be some circumstances in which a buyer would be better positioned to litigate a case (because of expertise or resources, for example) than the party that owned it when the physical takings cause of action accrued.[362] From this perspective, at least, there does not seem to be a strong justification for treating physical and regulatory takings claims in a categorically different way.

This issue is probably of more academic than doctrinal interest. *Palazzolo* clearly establishes the inalienability rule for physical takings. The Supreme Court might eventually clarify that *Palazzolo*'s rule only applies to *Loretto*-style invasions that begin immediately, and not to

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

360. Anello v. Zoning Bd. of Appeals of Dobbs Ferry, 678 N.E.2d 870, 873 (N.Y. 1996) (Wesley, J., dissenting). A related argument is that property owners may not have the resources to ripen a takings claim. *See* Brown, *supra* note 348, at 38–39. Because claims based on access regulations ripen immediately, *see* discussion *supra* Part V.B, this is not a reason to allow property owners to transfer their takings claims to subsequent purchasers.

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

362. *See id.* at 739–41.

Cedar Point-style invasions, where there could be a delay between an entry and its prior authorization. Until then, such a distinction does not exist in the doctrine. Even if the Supreme Court decides to abrogate the *Palazzolo* rule for *Cedar Point* takings, the consequences would be modest: The rule would only apply when the landowner sells the property while the statute of limitations is still running on the claim, a period spanning only a few years.

Reviewing the terrain we have covered, then, produces the following insights. The rule that physical takings causes of action accrue when the government authorizes a third party to invade land, not when the third party actually shows up to do so, is firmly embedded in the law. The Supreme Court implicitly recognized as much in *Knick*, and decades of decisions from the Federal Circuit and other federal appellate courts are in accord. The pragmatic justifications for this rule are compelling. By contrast, the rule that physical takings causes of action do not run with the land is at present well-established by binding Supreme Court authority in *Palazzolo*. But that part of *Palazzolo*'s holding is harder to justify in the context of physical takings claims, especially after *Knick* and the lower court precedents made determining when a physical taking cause of action accrues more straightforward.

VI. CONCLUSION

Lucas and *Cedar Point* are staples of Property Law course casebooks and landmark Supreme Court decisions, but neither of them ought to be. In both cases lawyers for state governments waived critical arguments on appeal that likely would have altered the outcomes in litigation. Had lawyers understood the facts of *Lucas* and the law governing *Cedar Point* better, those land-use disputes would have remained obscure controversies, the stuff of local water cooler discussions rather than grandiose pronouncements from the highest Court in the land. Perhaps California's lawyers' mistakes were more understandable than South Carolina's, in part because the mistakes went unnoticed by various judges, justices, lawyers, scholars, and amici prior to the publication of this Article.[363]

Regardless of the misjudgments made by counsel, the challenge for legal scholars trying to make sense of *Cedar Point* and *Lucas* is to pick

363. Hindsight is always 20/20, and there is another reason to have some sympathy for California's lawyers. Cedar Point Nursery's legal theories changed quite a bit between trial and appeal, with the plaintiffs shifting their emphasis from an "easement as per se taking" theory to the idea that the regulation was a per se taking because the regulation had no temporal endpoint. California should have advanced the argument we make above, but the courts let Cedar Point Nursery get away with making a moving target argument, and that development may have explained why California's lawyers missed persuasive responses to the claim that the Supreme Court ultimately embraced.

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

In our view, the "sky is falling" take on *Cedar Point* misses the mark. Physical takings claims stemming from non-permanent, part-time invasions may be lethal tools in the hands of owners who wish to challenge brand new limits on the right to exclude, like those stemming from eviction moratoria or ban-the-box rules in tenancies. That result is consequential today and will be more consequential still tomorrow. But restrictions on the right to exclude that are of older vintage seem safe, at least if defended by competent counsel for the State and if considered by jurists who care about stare decisis. A panoply of applicable statutes of limitations, cemented by decades of authority from the federal courts, makes it clear that the window to challenge laws like the Fair Housing Act as physical takings has long since closed. In our view, laws do not become background principles upon enactment. Yet it's entirely workable to say that they become background principles when the statute of limitations to challenge those laws, supplemented by equitable tolling rules or disability provisions that lengthen the timeframe in which plaintiffs can sue, has run. Such a rule would replace a messy and murky body of doctrine with a relatively manageable set of rules. As we see it, even though the Supreme Court was oddly unwilling to recognize a decades-old union access law as a "background principle of state property law," statutes and regulations dating from the 1970s have effectively achieved that status nonetheless. The consequential battles, going forward, will be over tomorrow's novel restrictions on the right to exclude.